Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

LEVI HOGNER,

Petitioner,

v.

LEROY M. STRENKE and
JUANITA M. STRENKE,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI*
TO THE STATE OF WISCONSIN
COURT OF APPEALS

PETITION FOR A *WRIT OF CERTIORARI*

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QUESTION PRESENTED

Can the state judiciary ignore the constitutional due process requirements for punitive damages, dismissing as "*dicta*" the standards in *State Farm Mut. Auto Ins. Co. v. Campbell*, to award more than 110 times the $2,000 actual damages in a personal injury/drunk driving case?

PARTIES

The respondents, Leroy and Juanita Strenke, were the plaintiffs in the underlying car collision case in the state trial court. The petitioner, Levi Hogner, was the primary defendant, driving the car that struck Strenke's car and injured Strenke. NAU Country Insurance Company ("NAU"), Hogner's liability insurer and a named defendant, participated in the state appellate proceedings. NAU's policy excludes coverage for punitive damages, however, and NAU has elected to conclude its involvement in the case. American Family Mutual Insurance Company, a named defendant because it had issued an insurance policy to Leroy Strenke, did not participate in any of the state appellate proceedings.

RULE 29.6 STATEMENT

Levi Hogner is not a corporation.

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PETITION FOR A *WRIT OF CERTIORARI*

Levi Hogner petitions for a *writ of certiorari* to review the decision and judgment of the Court of Appeals of Wisconsin, entered on August 2, 2005, affirming the constitutionality of the trial court's punitive damages award.

OPINIONS BELOW

The Wisconsin Court of Appeals (App., *infra*, 1a-17a) filed its opinion on August 2, 2005, now reported at 704 N.W.2d 309, 2005 WI App 194. The Wisconsin Supreme Court filed its order denying Hogner's petition for review (App., 18a) from that decision on November 11, 2005, reported at 2006 WI 3.

The Wisconsin Supreme Court's initial decision in the case had remanded it to the Wisconsin Court of Appeals after the Wisconsin Supreme Court deadlocked on the constitutional punitive damages question (App., 19a-60a). Issued on March 18, 2005, that decision is reported at 694 N.W.2d 296, 2005 WI 25. The Wisconsin Court of Appeals issued a Certification Order (App., 61a-68a) on May 18, 2004, sending the case to the Wisconsin Supreme Court, but the Certification Order is not reported. The Order for Entry of Judgment and Judgment on the Verdict of the Circuit Court for Barron County (Wisconsin) (App., 69a-70a) was filed on August 13, 2003. It is not reported.

JURISDICTION

This Court has jurisdiction to review the judgment of the Wisconsin Court of Appeals under 28 U.S.C. § 1257(a) and pursuant to U.S. Supreme Court Rule 10(c). On November 11, 2005, in response to a timely petition for review, the Wisconsin Supreme Court declined to exercise its discretionary jurisdiction to review the ruling. Two justices dissented. That exhausted the state court procedural

alternatives, leaving this petition as the only avenue for any review of the constitutionality of the state appellate court's decision.[1]

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The Wisconsin Court of Appeals, affirming a punitive award 112.5 times the actual damages in this case, flatly dismissed the command of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), that punitive damages should almost never exceed a single digit multiple of actual damages. The Wisconsin Court of Appeals held that the jury's award of punitive damages was not excessive and, accordingly, did not violate the Due Process Clause. The facts are straightforward and undisputed.

On October 16, 1998, the petitioner, Levi Hogner, drank 16 to 18 beers and, driving his motor vehicle impaired, turned left in front of an oncoming car, causing a collision. Hogner's car struck that of the respondent, LeRoy Strenke, who suffered a lower back injury in the collision.

With a blood alcohol content of .269 percent, Hogner was charged by the state with operating a motor vehicle while intoxicated. He pled no contest and served a year in

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[1] *See* Supreme Court Rule 13 ("[a] petition for a *writ of certiorari* seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.").

jail. In addition, Hogner underwent court-ordered alcohol assessment, had his driver's license revoked for 36 months and was fined $3,041—twice the statutory minimum sentence, five times the statutory minimum fine.

Strenke sued for damages in a civil trial that lasted three days. A jury awarded him $2,000 in compensatory damages for his injuries and $225,000 in punitive damages. Strenke's attorney had asked the jury to award only $25,000 in punitive damages.

In a May 28, 2003 post-trial motion, Hogner asked the trial court for either remittitur or a new trial on the punitive damages issue, stating: "[t]he punitive award in [this] case violates ... the Fourteenth Amendment of the United States Constitution.... In light of Mr. Hogner's economic condition," his counsel said, "an award of punitive damages in the amount of $225,000 is not only excessive, it violates his due process rights under the Fourteenth Amendment." The trial court denied Hogner's due process motion on July 7, 2003 and entered judgment on the verdict on August 13, 2003.

Hogner appealed the judgment to the Wisconsin Court of Appeals, which certified three questions to the Wisconsin Supreme Court. *See* § 809.61, Wis. Stats. (2003-04) ("The [Wisconsin] Supreme Court may take jurisdiction of an appeal ... upon certification by the [Wisconsin] court of appeals ..."). The third certified question, a question of federal constitutional law, has become the basis for this *writ of certiorari*: "is the jury's punitive damage award excessive or in violation of Hogner's due process rights?" App., 5a.

On March 18, 2005, the Wisconsin Supreme Court answered the two companion questions of state law the Court of Appeals had certified, but it split evenly (3-3) on the

federal constitutional question, remanding the case to the Court of Appeals for a ruling. App., 5a-6a. On August 2, 2005, the Court of Appeals answered the question negatively, concluding that the punitive award did not violate Hogner's due process rights. App., 17a.

In his ensuing petition for review, Hogner asked the Wisconsin Supreme Court to revisit its "evenly divided" vote on the constitutionality of the punitive award. The Wisconsin Supreme Court declined, denying Hogner's petition on November 11, 2005.

The constitutional question here—whether the punitive award violates the right to due process—has been presented at every stage of the litigation in every court that has heard the case. Only the Wisconsin Court of Appeals reached the merits of that federal constitutional question, however, resolving it erroneously and in a manner that warrants final review. The Wisconsin Court of Appeals dismissed *State Farm* as "*dicta*," relied on "potential harm" to justify an unconstitutional damages' ratio, and ignored the defendant's indigence in the excessiveness inquiry. This Court now has an opportunity to review the Wisconsin Court of Appeals' decision and, in the process, to resolve any gap in this Court's punitive damages jurisprudence. It can also establish that this Court's explicit directives in *State Farm v. Campbell* are not to be ignored.

REASONS FOR GRANTING THE WRIT

Three years ago, in *State Farm*, this Court established quantitative and qualitative standards for enforcing the constitutional guarantee of due process in punitive damage cases. The majority opinion, written by Justice Kennedy, left no doubt about one constitutional standard for punitive damages:

> [I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

State Farm, 538 U.S. at 425.

Notwithstanding the decision's clarity, a growing number of courts have disregarded it, manipulating "exceptional" cases to avoid this Court's punitive damages jurisprudence. Instead of relative certainty, one of the very goals of due process, there is constitutional disarray. Trial and appellate courts all too routinely have ignored or defied the decision. Punitive awards continue to grow without constitutional bounds, and no case is more illustrative than this one.

Following an increasing number of courts that have disregarded the specific holdings in *State Farm*, the Wisconsin Court of Appeals affirmed a punitive damages award 112.5 times the amount of compensatory damages. In doing so, the decision brushed aside this Court's directive that punitive damage awards be demonstrably linked to actual damages. The Wisconsin court explicitly dismissed *State Farm*'s admonition that awards exceeding a single-digit ratio of punitive to compensatory damages are constitutionally flawed, relying instead on the concept of the "potential harm" from the accident.

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). Unfortunately, while some courts have carefully followed *State Farm* in evaluating punitive

awards to ensure fairness, the courts that have not are all too common.

The Wisconsin court ignored at least three key components of this Court's constitutional mandate in *State Farm*: proportionality, the focus on actual harm, and the defendant's wealth. Each, alone, would justify issuance of the *writ*. Combined, the errors erode this Court's constitutional authority, deny due process, and gratuitously create uncertainty surrounding the law of punitive damages.

I. *STATE FARM'S* SINGLE DIGIT RULE IS NOT "DICTA."

"[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425. If by "few," the Court intended to say "most," then the Court should not grant this petition for *certiorari*. If, by contrast, the Court's intention was to require even closer scrutiny of high-ratio awards, then the Court should grant this petition to re-emphasize its use of the term "few" and the constitutional foundation for it.

The Court of Appeals of Wisconsin dismissively characterized *State Farm*'s ruling as "dicta," 704 N.W.2d at 316 n.14, raising a serious question about the binding force of U.S. Supreme Court precedent.[2] The "single-digit rule" of *State Farm* was not *dicta*. Even if it were, moreover, this Court has recognized that some *dicta* has

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[2] The United States District Court for the Southern District of West Virginia, for example, also has repeatedly ignored *State Farm*'s "dicta." *See Dunlap v. Green Tree Servicing, LLC*, No. 05-0311, 2005 U.S. Dist. LEXIS 32485, at *15 (S.D. W.Va. Nov. 28, 2005); *McGraw v. Discover Financial Services Inc*, No. 05-0215, 2005 WL 1785259, at *5 (S.D. W.Va. July 26, 2005); *Grubb v. Jos. A. Bank Clothiers, Inc.*, No. 05-0056, 2005 WL 1378721 (S.D. W.Va. June 2, 2005).

compelling significance. *See Ashcroft v. ACLU*, 535 U.S. 564, 594 (2002) (Kennedy, J., concurring) (distinguishing "casual *dicta*" from "one rationale for the holding of the case"); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

Indeed, *State Farm*'s single digit statement was integral to the Court's holding there that a punitive award 145 times compensatory damages could not withstand constitutional scrutiny. This new quantitative standard, established by the majority opinion, was not lightly considered. Indeed, a dissenting opinion in *State Farm* characterized this holding as a "marching order[]." *State Farm*, 538 U.S. at 439 (Ginsburg, J., dissenting). Hardly *dicta*. Courts cannot be cavalier with this Court's application of constitutional law.

To avoid the unavoidable conclusion—had it followed *State Farm*—that the 112.5-to-1 ratio is constitutionally excessive, the Wisconsin Court of Appeals relied upon the sole, narrow exception to the single-digit rule. "[R]atios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *State Farm*, 538 U.S. at 425, *citing BMW*, 517 U.S. at 582.[3] Yet even "ratios greater than those we have previously upheld" still must be "reasonable and proportionate to the amount of harm *to the plaintiff* and to

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[3] The Wisconsin court cited *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), upholding a 37-to-1 ratio where bed bug bites plagued hotel guests, to justify its approval of the 112.5-to-1 ratio. The Wisconsin court failed to recognize, however, the Seventh Circuit's own limitation on the holding: "*Mathias* holds that punitive damages may be a large multiple of any one victim's loss when a defendant's acts inflict small losses on hundreds of people." *Munro v. Golden Rule Ins. Co.*, 393 F.3d 720, 722 (7th Cir. 2004). Hogner injured just one person.

the general damages recovered." *State Farm*, 538 U.S. at 426 (emphasis added). If not, then any state court can ignore the constitutional parameters of punitive damages simply by labeling a defendant's conduct "particularly egregious" and ignoring the "harm to the plaintiff" in favor of "potential harm."[4] *See supra* at II.

In this regard, this case is ideal for a resolution of the continuing conflict between clear and binding constitutional precedent and rebellious state courts bent on ignoring it. The case's simplicity commends it.

Hogner's fifth drunk driving offense, with a blood alcohol content more than twice the legal limit, was an obvious violation of state law, subjecting him to substantial criminal punishment. Drunk driving is "reprehensible" in the word's truest sense: it has no possible legitimate purpose or redeeming social value. Conduct that is pure in its egregiousness, stripped of the ambiguity inevitably present in cases of factual complexity, gives the Court a particular ability to reiterate the reach of the Constitution's due process protection.

Even—or perhaps, especially—Levi Hogner, an indigent recidivist drunk driver whose conduct fortuitously caused only minimal harm, is entitled to the full promise of due process protection. So are the litigants in the tobacco cases, of course, or the thousands harmed by a flawed commercial product or the victims of an environmental

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[4] Another pending *certiorari* petition, *Philip Morris USA v. Boeken*, petition for cert. filed, 74 U.S.L.W. 3308 (U.S. Nov. 8, 2005) (No. 05-594), addresses a corollary issue, whether a punitive award more than nine times the compensatory damages violates *State Farm* where compensatory damages are, distinctly unlike the damages in this case, "substantial."

disaster. The issues in this case, however, involve neither multiple causes nor multiple defenses.

This Court recently declined to accept another drunk driving case for review, *Craig v. Holsey*, 264 Ga. App. 344, 590 S.E.2d 742 (Ga. Ct. App. 2003), *cert. denied*, 534 U.S. 820 (2004), with its 22-to-1 punitive award. It was far less compelling—both because of its lower ratio and because it asked this Court to review state court evidentiary rulings that led to the excessive award. No procedural complexities present themselves here. Punitive damages of more than 110 times a compensatory award in a simple case with an uncluttered record raise "a suspicious judicial eyebrow," *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting), and merit the attention of this Court.

This case involves a commonplace (too commonplace) drunk driving accident on a rural Wisconsin road. The injuries were slight. The parties and the circumstances and the practical consequences were unremarkable. Yet these very circumstances place the constitutional principle in stark relief. And it is a constitutional principle repeatedly ignored in a growing number of cases.

Dissenting in *TXO*, 509 U.S. at 473, Justice O'Connor hoped that punitive damage awards someday would "receive sufficient constitutional scrutiny to restore fairness in what is rapidly becoming an arbitrary and oppressive system." Justice Breyer later lamented that a state punitive damages regime "expects jurors to act, at least a little, like legislators or judges." *BMW*, 517 U.S. at 596 (Breyer, J., concurring). "We note once again our concern about punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). Those concerns were as well-placed more than ten years ago as they were

more recently when the Court reiterated, in *State Farm*, its "concerns over the imprecise manner in which punitive damage systems are administered." 538 U.S. at 417. They still are well-placed today.

There had been reason to believe that *State Farm* would alleviate the concerns. *See* Charles S. Doskow, The *State Farm* Punitive Damage Multiplier in the Courts: Early Returns, 17 St. Thomas L. Rev. 61, 82 (2004) ("the Supreme Court intended *State Farm* to be the definitive word"); Garrett T. Charon, Beyond a Bar of Double-Digit Ratios: *State Farm v. Campbell*'s Impact on Punitive Damages Awards, 70 Brook. L. Rev. 605, 632 ("*State Farm* clarified the outer boundaries of permissible punitive damages...."). That has not happened. To the contrary, whether or not they dismiss the holding as "*dicta*," courts across the country have addressed punitive damage issues almost as if *State Farm* had never been decided.[5]

Examples abound:

- *Krysa v. Payne*, 176 S.W.3d 150 (Mo. Ct. App. 2005) (27-to-1 ratio for fraudulent nondisclosure and misrepresentation in sale of a used truck)

- *Superior Federal Bank v. Jones & Mackey Constr. Co., LLC*, No. CA 04-1389, 2005 WL 3307074 (Ark. Ct. App. Dec. 7, 2005) (17.6-to-1 ratio for defamation, blaming "great confusion

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[5] *See* Laura J. Hines, Due Process Limitations on Punitive Damages: Why *State Farm* Won't Be the Last Word, 37 Akron L. Rev. 779, 812 (2004) ("Although the Court obviously intended *State Farm* to clarify past ambiguities and provide practical guidance to lower courts considering punitive damage claims, an examination of a number of recent lower court cases reveal[s] that it fell seriously short in this endeavor.").

and controversy" on "U.S. Supreme Court's rather conflicting statements on the matter.")

- *Williams v. Philip Morris, Inc.*, No. 551805, 2006 WL 242456 (Or. Feb. 2, 2006) (152-to-1 ratio for tobacco related injuries and fraud, noting that "economic damages could easily have been 10 or more times the amount awarded here.")

- *Mission Res., Inc. v. Garza Energy Trust*, 166 S.W.3d 301 (Tex. App. 2005) (20-to-1 ratio for mineral lease trespass and breach of duty of good faith)

- *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629 (6th Cir. 2005) (2,150-to-1 ratio in § 1983 case)

- *CGB Occupational Therapy, Inc. v. RHA Pennsylvania Nursing Homes*, No. 00-4918, 2005 WL 1595428 (E.D. Pa. July 5, 2005) (19-to-1 ratio for tortious interference with contract)

- *Kemp v. AT&T*, 393 F. 3d 1354 (11th Cir. 2004) (2,173-to-1 ratio for fraudulent billing practices)[6]

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[6] Cases that have applied *State Farm* faithfully also abound, suggesting wide disagreement among lower courts over *State Farm*'s impact. *See, e.g., Estate of Moreland v. Dieter*, 395 F.3d 747, 757 (7th Cir. 2005), *cert. denied*, 125 S. Ct. 2915 (2005) (upholding approximately 1-to-1 ratio); *Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 777 (9th Cir. 2005) (remanding to determine punitive damages award between 6-to-1 and 9-to-1 ratio); *Hines v. Grand Casino of La., L.L.C.*, 358 F. Supp. 2d 533, 553 (W.D. La. 2005) (reducing award to 1.5-to-1 ratio); *Austin v. Specialty Transp. Services*, 594 S.E.2d 867 (S.C. Ct. App. 2004) (affirming 2.5-to-1 ratio); *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Or. Ct. App. 2003) (reducing award to 4-to-1 ratio).

Not surprisingly, in *State Farm*'s wake, this Court has entertained dozens of petitions for a *writ of certiorari* in cases involving "excessive" punitive awards. Enough time has passed, however, to discern a systemic response—by the lower courts—that collides with *State Farm*'s explicit commands and that highlights constitutional violations thought to have been resolved.

"*Dicta*" notwithstanding, the punitive award against Levi Hogner is constitutionally excessive. The Wisconsin Court of Appeals may not substitute its judgment for the undiscriminating procedural protection that the Constitution guarantees every citizen.

II. A VAGUE NOTION OF "POTENTIAL HARM" CANNOT JUSTIFY AN UNCONSTITUTIONAL PUNITIVE DAMAGES RATIO.

This Court presaged its analysis of the constitutional dimensions of punitive damages in 1989 in *Browning-Ferris Indust. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989) ("There is some authority … for the view that the Due Process Clause places outer limits on the size of a civil damages award ….). Almost immediately, the Court then addressed the role of harm, actual or potential or both, in establishing the basis for any punitive award. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 41-42 (Kennedy, J., concurring) ("the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice.... [The ratio] provides firmer guidance and rests on sounder jurisprudential foundations than does the approach espoused by the majority.").

In *TXO Production Corp. v. Alliance Resources Corp.*, an unusual case involving a fraudulent scheme that failed, this Court stated that "[p]unitive damages should bear

a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred." 509 U.S. at 460, *citing Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W.Va. 1991). "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim ... as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *TXO*, 509 U.S. at 460.

"In sum," this Court concluded, "we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case *of this character*." *Id.* at 462 (emphasis added). The "character" of the *TXO* case, however, was quite different from this drunk driving case.

The Wisconsin Court of Appeals misapplied *TXO* to explain its perception of constitutional due process:

> If we consider only actual harm, it is hard to argue that Hogner would expect that an accident that caused $2,000 in damages would subject him to a punitive damage award of more than 100 times that amount.... If we consider *potential damages*, however, the excessiveness calculus changes. Hogner's conduct could have injured Strenke seriously or even killed him. Absent what might arguably be called Hogner's "good luck," his conduct thus might easily have resulted in consequential damages that would have put the $225,000 award in the 1:1 or 2:1 range.

Strenke, 704 N.W.2d at 316 (emphasis added). While the Wisconsin Court of Appeals acknowledged that *TXO*

predated *BMW* and *State Farm*, it quipped, "*TXO* is still good law." *Strenke*, 704 N.W.2d at 316 n.13.[7]

Perhaps. Yet *TXO* was not without its critics on this point, even among concurring justices. Justice Kennedy, declaring the case "close and difficult," emphasized that "a jury is bound to consider only the evidence presented to it in arriving at a judgment." The record in *TXO* "[did] not contain evidence, argument, or instructions regarding ... potential harm ... and so would not have permitted a reasonable jury to render its verdict on this basis." *TXO*, 509 U.S. at 468.

Justice O'Connor, in fact, probed the record in *TXO* for evidence of "potential harm" and found none. "[T]he potential harm theory is little more than an after-the-fact rationalization invented by counsel to defend this startling award on appeal." *Id.* at 484-85. (O'Connor, J., dissenting).

The same is true here. The Wisconsin Court of Appeals offered no record citation to support its conclusory statement that "Hogner's conduct could have injured Strenke seriously or even killed him." *Strenke*, 704 N.W.2d at 316. Yet that speculative statement about potential harm provided the sole basis for the massive punitive award.

Despite the prescience of the concurring and dissenting Justices in *TXO*, Wisconsin's Court of Appeals might have been justified in relying myopically on the plurality opinion in that case—had it not been for the

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[7] *See* Erwin Chemerinsky and Ned Miltenberg, The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases, 36 Ariz. St. L. J. 513, 525 (2004) ("*State Farm* did not overrule, or even call into question, the Supreme Court's ten-year-old ruling in *TXO* ....").

evolution of the constitutional law of punitive damages in the intervening ten years.

To apply *TXO* without addressing the substantial and substantive limitations subsequently imposed by this Court in *BMW* and in *State Farm* goes beyond respect for *stare decisis* to a perverse form of precedential denial. Both cases should have prevented the Wisconsin court's reliance upon "potential harm" as a means to justify the astonishing award in this case. They did not.

In *BMW*, "there [was] no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy." 517 U.S. at 582. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 442 (2001), the Court rejected speculative "potential harm" to the plaintiff as a basis for a punitive award. Finally, in *State Farm*, this Court reiterated that a punitive award must be both "reasonable and proportionate to *the amount of harm to the plaintiff and to the general damages recovered*." 538 U.S. at 426 (emphasis added).[8]

Despite this Court's explicit directive that actual compensatory damages must be the anchor for a constitutional punitive award, the Wisconsin court allowed unsubstantiated speculation about a plaintiff's potential

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[8] "The principle that exemplary damages must bear a 'reasonable relationship' to *compensatory damages* has a long pedigree." *BMW*, 517 U.S. at 580 (emphasis added), *citing Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) ("real damages sustained"); *Saunders v. Mullen*, 24 N.W. 529, 529 (1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large"); *Flannery v. Baltimore & Ohio R. Co.*, 15 D.C. 111, 125 (1885) ("injuries received"); *Houston & Texas Central R. Co. v. Nichols*, 9 Am. & Eng. R.R. Cas. 361, 365 (Tex. 1882) ("actual damages sustained"); *McCarthy v. Niskern*, 22 Minn. 90, 91-92 (1875) ("compensation for the injury").

damages to distort the process. *See Strenke*, 704 N.W.2d at 316 n.14 ("If actual damages had been $25,000, an amount easily reached in car accidents, the punitive damages award would be constitutional even under the must [sic] restrictive and mechanical reading of the *dicta* in *State Farm*"). Allowing parties to inflate the "actual damages" component of the constitutional analysis using speculation about potential harm "empt[ies] the 'reasonable relationship' test of meaningful content." *BMW*, 517 U.S. at 590 (Breyer, J., concurring).

The purpose of the proportionality inquiry is to ensure uniformity. "Without objective criteria on which to rely, almost any decision regarding proportionality will be a matter of personal preference.... To avoid that element of subjectivity, our 'judgment[s] should be informed by objective factors to the maximum possible extent." *TXO*, 509 U.S. at 480-81 (O'Connor, J., dissenting). When, as in *State Farm* and here, harm to the plaintiff is both tangible and fixed, hypothetical harm cannot be part of the constitutional punitive damages calculus.[9]

There is, in virtually every tort, "potential harm" that is limited only by the imagination. The mundane collision of Hogner's car with Strenke's provides a ready example. Strenke could have been seriously hurt. So could his wife. There might have been other cars on the road—with or without passengers. Pedestrians might have been involved.

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[9] The pending petition for *certiorari* by the damaged plaintiff in *Southern Union Co. v. Irvin*, petition for cert. filed, 74 U.S.L.W. 3372 (U.S. Dec. 15, 2005) (No. 05-800), asks this Court to assign error to the U.S. Court of Appeals for the Ninth Circuit's decision to limit a punitive award to "only" nine times compensatory damages where actual harm to parties other than the plaintiff and potential harm might have justified the jury's 154-to-1 award. That case, too, could provide a vehicle to address the role of "potential harm" in the constitutional punitive damages analysis.

There is literally no end to the speculative harm from a drunk driver loose on the road.[10]

Unless addressed by this Court, "potential harm" can eviscerate in many cases the constitutional standards established in *BMW* and *State Farm*. Any punitive award, no matter its size or proportionality, can be justified by measuring it not against the harm that actually occurred but, rather, the harm that might have occurred. The single digit proportionality standard established in *State Farm* requires, if it is to have any meaning, a corollary that establishes the actual harm measured by a jury's compensatory damages award as the basis for determining the ratio between compensatory and punitive damages. *See Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224, 234 (3d Cir. 2005) ("We do not agree that this is a 'potential harm' case ....").

"Like everyone else in the court system, juries need and deserve objective rules for decision. Deprived of any fixed landmarks and guideposts, any of us can be distracted, played on, and befuddled to the point where our best guess is far from reliable." *TXO*, 509 U.S. at 475 (O'Connor, J., dissenting), *citing* Walter K. Olson, *The Litigation Explosion* 175 (1991). The "objective rules" established in *State Farm* are being ignored routinely. Courts like the Wisconsin Court of Appeals are declaring the "rules" irrelevant *dicta* or inflating awards based on potential harm. This Court should take this case to end that practice.

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[10] "Virtually any tort ... can cause millions of dollars of harm if imposed against a sufficient number of victims." *TXO*, 509 U.S. at 485 (O'Connor, J., dissenting).

III. A DEFENDANT'S FINANCIAL RESOURCES ARE NECESSARILY PART OF THE CONSTITUTIONAL ANALYSIS.

"The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427. If, by this statement, the Court intended to make a defendant's indigence irrelevant to the proportionality inquiry, then the Court should not grant this petition for *certiorari*. Despite unrebutted evidence that the defendant has no hope of ever satisfying a $225,000 judgment, the Wisconsin Court of Appeals refused to even consider the defendant's financial position in evaluating the constitutionality of the award. "[T]he fact that Hogner's assets are limited does not by itself mean that the ... award is grossly excessive[,] and we cannot say that a judgment that cannot be immediately satisfied is always ... constitutionally insupportable." *Strenke*, 704 N.W.2d at 317 n.17.

This Court has not directly addressed whether indigence, rather than significant wealth, is a proper factor in determining punitive damages. Yet the common law principle that a punitive award may not be so large as to "deprive the wrongdoer of his means of livelihood" dates, at least, to the *Magna Carta*. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 288 (O'Connor, J., concurring in part, dissenting in part). Logic alone dictates that a defendant's *lack* of wealth is, indeed, a factor in the inquiry: financial punishment is inevitably and necessarily relative.

"Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's interest in retribution (though not necessarily to its interest in deterrence) ...." *BMW*, 517 U.S. at 591 (Breyer, J., concurring). One goal of this Court's constitutional jurisprudence is to ensure that states fairly

discharge their responsibilities without imposing punishments so disproportionate and excessive that they constitute a deprivation of property without due process of law. *See Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909). The relative magnitude of the "property" at issue should play a role in the constitutional analysis. *See, e.g., Robbins v. Sanders*, No. 1040437, 2005 WL 2692486, at *12 (Ala. Oct. 21, 2005) (punitive damages "should punish without destroying").

Wisconsin law, in fact, requires juries to consider the financial position of a defendant in fixing the amount of a punitive award. *See Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 661 N.W.2d 789, 800, 2003 WI 46, ¶ 53. This Court, too, has approved the use of such factors in the assessment of punitive awards. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. at 462 n.28; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 21-22. Yet the Wisconsin Court of Appeals rejected this indispensable factor in the constitutional analysis.

Hogner's trial testimony was uncontroverted. He had few, if any, assets from which to satisfy any punitive award, much less the enormous award imposed by the jury. Hogner testified that his total monthly income was approximately $2,000 at the time of the accident, including a *per capita* payment for his membership in an Indian tribe. With $20 in his checking account, Hogner owned no land, boats, or other valuable items. His monthly expenses included a car payment of $226, $139 in rent, $400 for food, and $30 for utilities. In addition, Hogner paid child support of $350 a month and owed a hospital $3,300.[11]

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[11] Though evidence of insurance for punitive damages is inadmissible in Wisconsin, *see City of West Allis v. Wisc. Elec. Power Co.*, 635 N.W.2d 873, 889, 2001 WI App 226 ¶ 49, Hogner's automobile insurance policy, like most policies, explicitly excludes punitive damages.

Even if Hogner paid every penny of his disposable income to the plaintiffs, it would take him more than 23 years to pay the punitive damages award. Damages attributable to drunk driving are not dischargeable in bankruptcy, of course, making a fresh start impossible for Hogner. 11 U.S.C. § 523(a)(9).

The Constitution should not permit one jury's arbitrary civil penalty, unchecked on appeal, to ruin an individual for life financially. This is especially true where, as in Hogner's case, the individual already has paid society by serving a substantial jail sentence and carrying a significant non-dischargeable fine. To do so would allow "a decisionmaker's caprice," *BMW*, 517 U.S. at 587 (Breyer, J., concurring), to supplant the application of law and undermine the consistency and uniformity that the Constitution guarantees defendants, rich or poor.

Whether it is confusion on the part of lower courts or disregard for this Court's authority, the trend reflected in this case should not continue. This Court should articulate now, nearly three years after *State Farm*, that its instructions in *State Farm* were not idle commentary but, rather, the binding precedent of the Court. Only the restatement and clarification of the law by this Court will ensure the uniformity, fairness, and substantial justice that is the goal of any punitive damages jurisprudence.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a *writ of certiorari*, hear this case and reverse the decision of the Wisconsin Court of Appeals. The courts' persistent willingness to ignore or challenge the established precedent of this Court should be addressed through this case.

Dated: February 9, 2005.

Respectfully submitted,

LA FOLLETTE GODFREY & KAHN

By: /s/ Katherine Stadler
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APPENDIX

APPENDIX A

COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

2003AP2527

LeRoy M. Strenke and Juanita M. Strenke,
Plaintiffs-Respondents,
v.
Levi Hogner and NAU Country Insurance Company,
†Defendants-Appellants,
American Family Mutual Insurance Company,
Defendant.

Opinion Filed:	August 2, 2005
Submitted on Briefs:	April 4, 2005

JUDGES: CANE, C.J., HOOVER, P.J., AND PETERSON, J.

On behalf of the defendants-appellants, the cause was submitted on the briefs of *Karen J. Kingsley of Kingsley Law Office, P.A.* of St. Paul, Minnesota.

On behalf of the plaintiffs-respondents, the cause was submitted on the brief of *Owen R. Williams of Owen R. Williams* Trial Lawyers of Amery, and of counsel: *Lynn R. Laufenberg* of Laufenberg & Hoefle, S.C. of Milwaukee.

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† Petition for Review denied Nov. 11, 2005

COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP2527 **Cir. Ct. No. 2001CV179**

STATE OF WISCONSIN **IN COURT OF APPEALS**

LeRoy M. Strenke and Juanita M. Strenke,
Plaintiffs-Respondents,
v.
Levi Hogner and NAU Country Insurance Company,
Defendants-Appellants,
American Family Mutual Insurance Company,
Defendant.

APPEAL from a judgment of the circuit court for Barron County: FREDERICK A. HENDERSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Levi Hogner and his insurer, NAU Country Insurance Company, appeal that portion of a judgment awarding punitive damages of $225,000 to LeRoy Strenke for a car accident that occurred when Hogner was driving while drunk. Hogner also appeals the trial court's denial of his motions for remittitur and a new trial. Hogner argues the award is so excessive it violates his due process rights under the United States and Wisconsin Constitutions because there was no rational relation between the amount of

compensatory damages and the amount of punitive damages and no reasonable relation between the punitive award and the civil and criminal penalties that could have been imposed. Hogner argues alternatively that because the punitive damage award was based on passion or prejudice, the court should have ordered a new trial or reduced the award to make it reasonable. Because we conclude the award, though large, is not grossly excessive and therefore not unconstitutional, we reject all of Hogner's arguments and affirm the judgment.

Background

Factual History

¶2 According to Hogner's trial testimony, he began drinking beer at his home around 8 a.m. on October 16, 1998. At 2:30 p.m., after drinking at least twelve beers, he drove to a nearby tavern where he drank four to six more beers. He eventually testified that he believed he had consumed sixteen to eighteen twelve-ounce beers over the span of five hours.[1] Sometime after 4 p.m., he decided to drive to another tavern. He got in his car and headed north on Highway 48 near Cumberland, Wisconsin. Strenke was driving south on the same road. As their cars approached the intersection of Highway 48 and Golf Course Road, Hogner turned left into the path of Strenke's car, causing a crash. Strenke injured his back in the collision.

¶3 Hogner's blood was drawn at the scene of the accident; his blood alcohol content later tested at .269%. Hogner pled no contest to operating a vehicle while intoxicated, fifth offense. He was sentenced to one year in jail, had his license revoked for thirty-six months, and paid fines of $3,041.

Procedural History

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[1] Hogner, who weighed 400 pounds, also testified that he had never injured anyone previously while drinking and driving and did not intend to hurt anyone on the day of the accident.

¶4 In May 2001, Strenke brought personal injury and punitive damage claims against Hogner and the case went to trial before a jury in May 2003. At the close of testimony, Hogner moved for a directed verdict, arguing that Strenke had not presented a prima facie case that he had acted maliciously or in intentional disregard of Strenke's rights.[2] The trial court denied the motion, agreeing there was no evidence of malice, but concluding the jury could find that Hogner had acted with intentional disregard. The jury was then asked whether Hogner "acted maliciously towards LeRoy Strenke or in intentional disregard" of Strenke's rights and what sum, if any, they would award in punitive damages. The jury answered the first question "yes." They answered the second question "$225,000"—although Strenke had been awarded $2,000 in compensatory damages and his attorney had requested only $25,000 in punitive damages.

¶5 After the verdict, Hogner moved for remittitur or a new trial. The trial court orally denied both motions and entered judgment. Hogner then appealed.

¶6 In response to Hogner's appeal, we certified three questions to the supreme court:

> (1) What proof is required for a plaintiff to recover punitive damages under the phrase "in an intentional disregard of the rights of the plaintiff" as provided in Wis. Stat. § 895.85(3) (2001-2002)?
>
> (i) If *Wischer v. Mitsubishi Heavy Indus. Am., Inc.*, 2003 WI App 202, ¶40, 267 Wis. 2d 638, 673 N.W.2d 303, review granted 271 Wis. 2d 108, 679 N.W.2d 544 (2004) is correct, are there sufficient facts from which a jury could conclude Levi Hogner

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[2] The proceeding was bifurcated; most of the evidence discussed here was not introduced until after the jury had decided Hogner's liability and the amount of compensatory damages.

was aware his acts were "practically certain" to cause injury?

(2) Must a defendant's conduct giving rise to punitive damages have been directed at the specific plaintiff seeking punitive damages?

(3) If there was sufficient evidence to submit a punitive damages question to the jury, is the jury's punitive damage award excessive or in violation of Hogner's due process rights?

¶7 On March 18, 2005, the supreme court concluded that "a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded."[3] *Strenke v. Hogner*, 2005 WI 25, ¶3, 279 Wis. 2d 52, 694 N.W.2d 296. The court also held that, under Wis. Stat. § 895.85 (2001-02), the conduct giving rise to punitive damages need not be directed at the specific plaintiff seeking punitive damages. *Id.*

¶8 The court agreed there was sufficient evidence to send the punitive damages question to the jury. *Id.*, ¶¶58, 63, 106. It was evenly divided,[4] however, on the question of

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[3] *Strenke* thus overrules *Wischer*, in which this court determined that "intentional disregard of the rights of the plaintiff" required unambiguous proof the defendant had a general intent to perform an act and either a specific intent to cause injury by that act or knowledge the act was practically certain to result in injury. *Wischer v. Mitsubishi Heavy Indus. Am., Inc.*, 2003 WI App 202, ¶40, 267 Wis. 2d 638, 673 N.W.2d 303, rev'd, 2005 WI 26, 279 Wis. 2d 4, 694 N.W.2d 320. Under *Strenke*, "intentional disregard" does not require an "intent to cause injury;" rather, it reconfirms the common law principle that punitive damages can be premised on conduct that is "a disregard of rights." *Strenke v. Hogner*, 2005 WI 25, ¶19, 279 Wis. 2d 52, 694 N.W.2d 296.

[4] Chief Justice Abrahamson and Justices Bradley and Roggensack would find the award constitutional; Justices Wilcox,

whether the damage award violated Hogner's due process rights. *Id.*, ¶4. That question was remanded to us to be decided according to "the principles set forth in *Trinity Evangelical Luth. Ch. v. Tower Ins. Co.*, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789." *Strenke*, 279 Wis. 2d 52, ¶4, 694 N.W.2d 296.

Discussion

The United States Constitutional Standard

¶9 The common-law method for determining punitive damages has long been recognized as constitutional. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17-18 (1991). In the last decades, however, the United States Supreme Court has also recognized that particular punitive damage awards can offend constitutional principles and, more recently, has sought to clarify the framework through which trial courts and courts of appeal review those awards.

¶10 In 1996, the Court overturned an Alabama punitive damage award, holding that "the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a 'grossly excessive punishment' on a tortfeasor." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996). In that case, the trial court awarded a BMW buyer $4,000 in compensatory damages, for buying a car that had been sold to him as new despite the fact it had been repainted before sale, and $4,000,000 in punitive damages.[5] *Id.* at 565.

Crooks, and Butler would not. Justice Prosser did not participate. *Strenke*, 279 Wis. 2d 52, ¶58.

[5] The Alabama Supreme Court reduced the punitive award to $2,000,000, disclaiming any reliance on acts that had occurred in other jurisdictions. While the United States Supreme Court agreed a state award could not be directed at deterring conduct outside the state's border, it found the reduced award still "grossly excessive." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

¶11 *BMW* set out the current federal framework, now adopted by many state courts, for analyzing the constitutionality of punitive damage awards. Where states have a legitimate interest in punishment and deterrence, they can authorize the award of punitive damages and give jurors some latitude to determine what amount of damages would vindicate the state's legitimate interest in those areas. *Id.* at 568. Any inquiry into the constitutionality of punitive damages must thus begin by identifying the state interests the award serves. *Id.* The *BMW* majority agreed that states had a legitimate interest in prohibiting deceptive trade practices, but noted that individual states provided that protection in different ways. *Id.* at 569-70. Based on that principle, no single state could impose economic sanctions on violators of their laws with the intent of changing the tortfeasor's conduct in other states. *Id.* at 572.

¶12 *BMW* linked grossly excessive awards with lack of notice, a critical nexus for due process violations. Whether an award was "grossly excessive" could be determined, *BMW* concluded, by examining three "guideposts:" the degree of reprehensibility of the conduct; the disparity between the harm or potential harm suffered by the plaintiff and the punitive damage award; and the difference between the remedy and other civil penalties imposed in comparable cases. *Id.* at 574-75.

¶13 The first factor was the most important—the degree of reprehensibility. *Id.* at 575. *BMW* held that recidivism increased reprehensibility, *id.* at 577, but observed that where the conduct in question skirted or evaded illegality, repetition did not have the same significance. *Id.* at 577-80. The second guidepost entailed comparing the award and the harm. The proper inquiry was "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that has actually occurred." *Id.* at 581. *BMW* refused to link constitutionality to any bright line rule or fixed ratio. It specifically noted that

"low awards of compensatory damages may properly support a higher ratio ... if ... a particularly egregious act has resulted in only a small amount of economic damages." *Id.* at 582. The third guidepost also required comparison. Weighing punitive damages against the civil penalties awarded in comparable cases reflected, the court reasoned, proper deference to the legislature's determination of appropriate sanctions. *Id.* at 583-84. In that context, *BMW* again stressed the problem of notice potentially created by multi-million dollar awards. *Id.* at 584.

¶14 In 2003, the Supreme Court revisited the punitive award question in another case involving an allegedly nation-wide scheme to refuse settlement in cases where excess verdicts were likely to be reached. The court found that the punitive damage award, $145,000,000, in that case violated due process.[6] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412 (2003).

¶15 *State Farm* reiterated the analytic framework set out in *BMW*, once more rejecting the idea that a state award can legitimately be based on the desire to deter a national pattern of behavior, particularly if that conduct is lawful in other states. *State Farm*, 538 U.S. at 420. Punitive damages also cannot be awarded, the court concluded, to punish conduct that has no relation to the harm suffered by the plaintiff in the case. *Id.* at 422-23.

¶16 But *State Farm* also clarified *BMW* in several respects,[7] most notably by identifying a list of factors critical

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[6] The compensatory damages were $1,000,000.

[7] Many courts have signaled that they see the Supreme Court's second "bite" at the question as one intended primarily to clarify *BMW*. *See, e.g., In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1076 (D. Alaska 2004) ([*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)] "while bringing the *BMW* signposts into sharper focus, does not change the analysis.").

to determining the degree of reprehensibility of conduct: (1) whether the harm caused was physical or economic; (2) whether the tortious conduct evinced a reckless indifference to health or safety of others; (3) whether the target was financially vulnerable; (4) whether the conduct was single and isolated or involved repeated actions; and (5) whether the harm was the result of intentional malice, trickery, deceit, or mere accident. *State Farm*, 538 U.S. at 419. Evidence of recidivism can make conduct more reprehensible, but that evidence must be connected to the particular harm done to the plaintiffs. *Id.* at 423.

¶17 In its discussions of the second and third guideposts, *State Farm* reaffirmed the essential *BMW* principles. Although the majority expressed a suspicion of double-digit ratios, *State Farm* again concluded there was no strict mathematical ratio for constitutionality, and higher ratios might be acceptable where egregious acts led only to small compensatory damages.[8] *State Farm*, 538 U.S. at 425. The majority also concluded that a punitive damage award could be compared to criminal as well as civil penalties. Criminal penalties, it reasoned, demonstrated legislative disapproval of a particular behavior; however, such sanctions were less useful in determining the appropriateness of the amount of an award than civil penalties.[9] *Id.* at 428.

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[8] Although the majority said "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," that remark is dicta and not, as the holding makes clear, a new single-digit rule. *State Farm*, 538 U.S. at 425.

[9] In both *BMW* and *State Farm*, the excessiveness of the awards reflects, at least in part, the court's determination that the awards violate a fundamental premise of state authority, that it can have a legitimate interest in punishment and deterrence only within its jurisdiction and that the conduct at issue, legal in many places, is simply insufficiently reprehensible.

The Wisconsin Standard

¶18 In the wake of *BMW* and *State Farm*, the Wisconsin supreme court concluded that all appellate review of punitive damages awards for "gross excessiveness" is de novo and upheld a $3,500,000 punitive damage award for bad faith refusal to backdate insurance coverage. *Trinity*, 261 Wis. 2d 333, ¶¶48, 70, 661 N.W.2d 789.

¶19 As employed in *Trinity*, the Wisconsin test for the constitutionality of punitive damage awards is virtually identical to the one developed in *BMW* and *State Farm*. *Trinity*, 261 Wis. 2d 333, ¶¶23, 48, 53, 661 N.W.2d 789. *Trinity* first identified the state's legitimate interest in punishment and deterrence, focusing on the message a substantial punitive damage award can send to other insurers, and then examined the *BMW* guideposts.[10] The court found Tower's conduct reprehensible because it was clearly prohibited by law and recidivist. *Trinity*, 261 Wis. 2d 333, ¶58, 59, 661 N.W.2d 789. It also concluded that, based on an estimate of potential damages, the award represented a "constitutionally acceptable" ratio of 7:1.[11] *Id.*, ¶65, 68. Finally, it recognized that Wisconsin had provided a criminal penalty, including a fine of up to $10,000, for violations of insurance statutes and rules. *Id.*, ¶68. But, noting *State Farm's* position that a criminal penalty has "less utility" in determining whether a punitive award is excessive, *Trinity* did not find that disparity significant enough to alter the constitutional analysis.

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[10] Unlike some jurisdictions, Wisconsin continues to support the message-sending function of punitive damage awards. *See, e.g., Trinity Evangelical Luth. Ch. v. Tower Ins. Co.*, 2003 WI 46, ¶50, 261 Wis. 2d 333, 661 N.W.2d 789.

[11] If *Trinty* had considered only out-of-pocket costs, however, the ratio would have been considerably higher.

¶20 The question before us now is whether, under the *BMW-State Farm-Trinity* standard, the $225,000 punitive damage award in this case is "grossly excessive." We conclude it is not.

¶21 *Strenke* is clearly distinguishable from *BMW* and *State Farm*. The state's interest in punishing and deterring drunk driving within its own jurisdiction is powerful and well-established. "Drunk driving is a terrible scourge." *Lievrouw v. Roth*, 157 Wis. 2d 332, 345, 459 N.W.2d 850 (Ct. App. 1990). In 1998 alone, for example, 10,167 people were injured and 388 killed in alcohol-related accidents in Wisconsin. *Id.* at 346, 459 N.W.2d 850. And there is no evidence here that the award was intended to deter the defendant from conduct in any other jurisdictions or to send a message to anyone except those who drive in Wisconsin. Like the award in *Trinity*, the punitive damage award in this case thus serves a legitimate state interest in punishment and deterrence in its own jurisdiction.

¶22 The degree of reprehensibly is the most important factor in any excessiveness inquiry and the conduct in this case qualifies as egregious. Hogner testified he had never hurt anyone previously while driving drunk, and never intended to. But those claims do nothing to mitigate his conduct. He admits to four previous arrests for drunk driving—the fifth came as a result of the accident. The drinking pattern established at trial, beginning at 8 a.m. at home and then moving on to taverns, would in addition provide grounds from which to infer that these five occasions of drunk driving represented only a fraction of the times Hogner drank and drove. Hogner's blood-alcohol level was more than three times the .08% level that establishes presumptive intoxication, arguably indicating profound indifference to the health and safety of others. He demonstrated even greater indifference each time he got in his car in search of more alcohol. Other jurisdictions have found, and we agree, that evidence of this sort establishes reprehensibility clearly, convincingly, and substantially.

See, e.g., *Stamp v. Jackson*, 887 So. 2d 274, 276 (Ala. Civ. App. 2003).

¶23 As the record makes clear, Hogner's conduct caused physical harm, demonstrated reckless indifference to the health and safety of others, and was part of an admitted pattern of conduct. *See State Farm*, 538 U.S. at 419. While it did not intentionally target economically vulnerable individuals, given the current realities of insurance and medical coverage, it certainly had a strong likelihood of affecting such individuals. *Id.* Four of the five factors used to measure reprehensibility are thus present in this case. The only factor arguably not present, based on Hogner's probable speed when the accident occurred, is "deliberate malice."

¶24 In considering the second guidepost, we must ask whether, despite the state's interest in punishment and deterrence of drunk drivers and the reprehensibility of the conduct at issue, the difference between $2,000 and $225,000 is so excessive it creates the kind of notice problem identified in *BMW* and *State Farm*. If we consider only actual harm, it is hard to argue that Hogner would expect that an accident that caused $2,000 in damages would subject him to a punitive damage award of more than 100 times that amount. In addition, Wisconsin case law[12] tends to disfavor awards whose ratio to compensatory damages is in the

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[12] We have recognized that *State Farm* favors single-digit ratios. *See Betterman v. Fleming Cos.*, 2004 WI App 44, ¶46, 271 Wis. 2d 193, 677 N.W.2d 673. But we have also recently upheld a punitive damage award that was over thirty times compensatory damages, *citing State Farm*, where a particularly egregious act resulted in only a small amount of economic damages. *Schwigel v. Kohlmann*, 2005 WI App 44, ¶¶21-22, 280 Wis. 2d 193, 694 N.W.2d 467. Wisconsin courts have thus remained true to the fundamental premise that "punitive damages must be decided on a case-by-case basis," which requires, as the United States Supreme Court has repeatedly affirmed, rejecting any mathematical ratio as the measure of constitutionality. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 302, 294 N.W.2d 437 (1980).

double digits. If we consider potential damages, however, the excessiveness calculus changes.[13] Hogner's conduct could have injured Strenke seriously or even killed him. Absent what might arguably be called Hogner's "good luck," his conduct thus might easily have resulted in consequential damages that would have put the $225,000 award in the 1:1 or 2:1 range.[14]

¶25 In addition, *State Farm*, *BMW*, and *Trinity* all recognize that ratios may be higher when an especially egregious act results in only limited economic damages. Though that logic has been applied primarily to cases in which economic damage is hard to quantify, such as civil rights cases,[15] or where small injuries to many can justify

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[13] In the seminal "potential harm" case, decided prior to *BMW* and *State Farm*, the Supreme Court upheld a punitive damage award of $10,000,000 in a slander of title case although the actual damage judgment was only $19,000. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 451 (1993). While the majority did not employ the current analytic framework, *TXO* is still good law.

[14] If actual damages had been $25,000, an amount easily reached in car accidents, the punitive damages award would be constitutional even under the must restrictive and mechanical reading of the dicta in *State Farm*.

[15] The Seventh Circuit has upheld awards where the ratio was the double-digit range for Title VII cases. *See, e.g., Lampley v. Onyx Accept. Corp.*, 340 F.3d 478 (7th Cir. 2003).

larger punitive awards,[16] the principle is applicable to drunk driving cases as well. *See, e.g., Craig v. Holsey*, 590 S.E.2d 742, 747-48 (Ga. App. 2003) (upholding a punitive damage award of $200,000, a 23:1 ratio, because the potential harm, death, was so much larger than the actual harm). When weighed against the potential damages in this case, an award of $225,000 is not grossly excessive.

¶26 Under the 1997-98 statutes, Hogner was subject to fines in the range of several thousand dollars as well as jail time for the precise conduct that injured this plaintiff. The statutory scheme governing drunk driving offenses, with its clear consideration of the problem of repeat offenders, represents the kind of legislative decision-making *State Farm* suggests should receive deference. Those penalties reflect the legislature's judgment about the level of deterrence and punishment necessary to prevent drunk driving. Such a scheme also creates expectations in defendants whose disruption can, in the right circumstances, result in constitutionally insufficient notice.

¶27 However, Hogner would also have been subject to far more severe penalties depending on the outcome of his

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[16] *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), upheld an award of $186,000 in punitive damages, on only $5,000 compensatory damage, in a case where a hotel infested with bedbugs continued to sell the infested rooms and refused to spray the premises. The court found the 37.2:1 ratio acceptable because the very low compensatory damages awarded to any individual injured traveler would make it unprofitable to bring a lawsuit against a major corporation on the kind of facts before it. *Id.* at 676-77. More recently, a 96:1 ratio was upheld in a tobacco case. *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (Or. App. 2004) (concealing tobacco health risks was tantamount to fraud practiced over a long period of time, justifying the large ratio). *Willow Inn, Inc. v. Public Serv. Mut. Ins. Co.*, 399 F.3d 224 (3rd Cir. 2005), upheld an award of $150,000 in punitive damages, even though the insured's actual loss, in a windstorm, was $2,000. The court added the total attorney fees and costs to that figure, however, to suggest the real ratio was closer to 1:1.

conduct. Unlike a corporation pursuing policies that skirt the law, drivers cannot claim they decide to drive after drinking because they knew they risked only the penalties arising from another OWI. When Hogner drove drunk on the night in question, he knew he risked arrest, incarceration, and a fine. But he also knew or should have known that, if disaster happened, he would have faced far more serious penalties. Like the jury in *Trinity*, the jury in this case could therefore have concluded that a large punitive damage award would work to support, rather than weaken, the civil and criminal sanctions imposed by the legislature, deterring Hogner and other Wisconsin citizens from gambling that they can drive and drink without seriously injuring themselves or anyone else.[17]

Remittitur and New Trial

¶28 When the trial court finds that a punitive damage award is the result of passion or prejudice, it does not fix a reasonable amount of damages, it orders a new trial. *Redepenning v. Dore*, 56 Wis. 2d 129, 133-34, 201 N.W.2d 580 (1972). If the court determines a verdict is excessive or inadequate not because of prejudice or passion or as a result of error during the trial, other than an error in the amount of damages, the court has the statutory authority to determine the amount that, as a matter of law, is reasonable. *See* Wis. Stat. § 805.15(6) (2001 - 02). The party to whom the option is offered may elect to accept that judgment or to have a new trial on the issue of damages alone. *See id.*

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[17] Hogner argues, albeit in a conclusory fashion, that the award is excessive based on his financial condition. Wisconsin courts have said that one of the factors a jury can consider in awarding punitive damages is the defendant's ability to pay. *See Wangen*, 97 Wis. 2d at 302, 294 N.W.2d 437. However, the fact that Hogner's assets are limited does not by itself mean that the jury failed to consider his wealth or that the award is grossly excessive and we cannot say that a judgment that cannot be immediately satisfied is always, as a matter of law, constitutionally insupportable.

¶29 Although the trial court's judgment did not explicitly address the decision not to grant a new trial, its oral statement that the award "doesn't shock my conscience" indicates it rejected passion and prejudice arguments. The court rejected the remittitur argument directly, albeit briefly, in a July 2004, motion on the issue. Noting that the jury heard evidence about the number of beers Hogner drank in a short period of time and about his intention to continue drinking, the court concluded it "was not going to change" the award.

¶30 Hogner argues nevertheless that the difference between the requested punitive damage award, $25,000, and the jury award, $225,000, is so excessive the jury must have based its verdict on passion or prejudice. Because the trial court is in the best position to determine whether "perversity pervaded" the verdict, we ordinarily will not upset its conclusions on this point absent an erroneous exercise of discretion. *Redepenning*, 56 Wis. 2d at 134, 201 N.W.2d 580. When the court does not set forth its reasons, however, we review the record independently to determine if the court made a reasonable inquiry and based its decision on facts in the record. *See McCleary v. State*, 49 Wis. 2d 263, 277-78, 182 N.W.2d 512 (1971). We see no evidence that the jury's verdict reflected "emotional, inflammatory, and immaterial considerations" and Hogner's only support for this argument is the assertion that the punitive damage award was too high in relation to the requested award.[18] *See Fahrenberg v. Tengel*, 96 Wis. 2d 211, 224, 291 N.W.2d 516 (1980).

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[18] When a punitive damage award reflects bias, passion or prejudice rather than a rational interest in deterrence and retribution, the Constitution is violated no matter what size the award. *TXO*, 509 U.S. at 467 (Kennedy, J., concurring). However, the size of the award is not "the sole, or even necessarily the most important, sign" of such improprieties. *Id.*

¶31 Hogner's argument that the trial court erred by not remitting the award only restates his constitutional argument. Because we have already rejected that argument, it cannot serve as a basis for claiming that the trial court erred when it did not find that the jury's verdict was excessively large as a matter of fact.

By the Court.—Judgment affirmed.

APPENDIX B

SUPREME COURT OF WISCONSIN

November 11, 2005

You are hereby notified that the Court has entered the following order:

No. 2003AP2527 Strenke v. Hogner L.C. #2001CV179

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendants-appellants-petitioners, Levi Hogner, et al., and considered by this court;

IT IS ORDERED that the petition for review is denied, with $50 costs.

Prosser, J., did not participate.
Wilcox and Butler, J.J., dissent.

Cornelia G. Clark
Clerk of Supreme Court

APPENDIX C

SUPREME COURT OF WISCONSIN

CASE NO.: 03-2527

LeRoy M. Strenke and Juanita M. Strenke,
Plaintiffs-Respondents,
v.
Levi Hogner and NAU Country Insurance Company,
Defendants-Appellants,

American Family Mutual Insurance Company,
Defendant.

ON CERTIFICATION FROM THE COURT OF APPEALS

OPINION FILED: March 18, 2005
ORAL ARGUMENT: October 28, 2004

COURT: Circuit
COUNTY: Barron
JUDGE: Frederick A. Henderson

JUSTICES:
CONCURRED: WILCOX, J., concurs (opinion filed).
DISSENTED:
NOT PARTICIPATING: PROSSER, J., did not participate.

No. 03-2527
(L.C. No. 01 CV 000179

STATE OF WISCONSIN : IN SUPREME COURT

LeRoy M. Strenke and Juanita M. Strenke,
Plaintiffs-Respondents,

v.

Levi Hogner and NAU Country Insurance Company,
Defendants-Appellants,

American Family Mutual Insurance Company,
Defendant.

FILED
MAR 18, 2005
Cornelia G. Clark
Clerk of Supreme Court

APPEAL from an order and judgment of the Circuit Court for Barron County, Frederick A. Henderson, Judge. *Affirmed in part and cause remanded.*

¶1. ANN WALSH BRADLEY, J. This case is before the court on certification from the court of appeals.[1] The defendants-appellants, Levi Hogner and NAU Country

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[1] Levi Hogner and NAU Country Insurance appeal from the punitive damages portion of a judgment entered by the circuit court for Barron County, Frederick A. Henderson, Judge. Alternatively, they appeal from the circuit court's denial of a motion for remittitur or a new trial on the issue of punitive damages.

Insurance, assert that there was insufficient evidence to allow the issue of punitive damages to go to the jury. Additionally, they contend that the jury's award of punitive damages was excessive, thereby violating Hogner's constitutional right to due process.

¶2. In its certification, the court of appeals states the issues as follows:

> (1) What proof is required for a plaintiff to recover punitive damages under the phrase "in an intentional disregard of the rights of the plaintiff" as provided in Wis. Stat. § 895.85(3) (2001-02)?[2]
>
> i. If *Wischer v. Mitsubishi Heavy Indus. Am., Inc.*, 2003 WI App 202, ¶40, 267 Wis. 2d 638, 673 N.W.2d 303, review granted (Wis. April 20, 2004) (Nos. 01-0724, 01-1031 & 01-2486), is correct, are there sufficient facts from which a jury could conclude Levi Hogner was aware his acts were "practically certain" to cause injury?
>
> (2) Must a defendant's conduct giving rise to punitive damages have been directed at the specific plaintiff seeking punitive damages?
>
> (3) If there was sufficient evidence to submit a punitive damages question to the jury, is the jury's punitive damage award excessive or in violation of Hogner's due process rights?[3]

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[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] The court of appeals also certified a fourth issue regarding Strenke's cross-appeal of whether the circuit court erred in bifurcating the compensatory damages from the punitive damages in this matter. Because we granted Strenke's motion for voluntary dismissal of his cross-appeal, however, we do not address the issue here.

¶3. In response to the issues presented, we conclude that a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. Furthermore, we determine that a defendant's conduct giving rise to punitive damages need not be directed at the specific plaintiff seeking punitive damages in order to recover under the statute.

¶4. However, we are equally divided on the question of whether the jury's punitive damage award was excessive and therefore in violation of Hogner's due process rights.[4] Accordingly, we affirm the judgment of the circuit court in part and remand to the court of appeals to decide this remaining issue consistent with the principles set forth in *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789.

I

¶5. This case arises out of an automobile accident that occurred on October 16, 1998. At the time of the accident, LeRoy Strenke was traveling northbound on Highway 48 near Cumberland, Wisconsin. Levi Hogner was traveling southbound on the same road. As Strenke approached the intersection of Highway 48 and Golf Course Road, Hogner's vehicle turned left into the path of Strenke's car, injuring Strenke.

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[4] Although the certification of the court of appeals treats excessiveness and due process as separate inquiries, we view them as intertwined. The Supreme Court has observed that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (*citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996)). *See also Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, ¶50, 261 Wis. 2d 333, 661 N.W.2d 789.

¶6. Hogner was charged with operating a motor vehicle while intoxicated. His blood alcohol content was tested to be .269%. He pled no contest to operating a motor vehicle while intoxicated, fifth offense. Hogner was sentenced to a year in jail, alcohol assessment, revocation of his driver's license for 36 months, and paid $3,041 in fines.

¶7. LeRoy and Juanita Strenke sued Hogner for negligence, seeking compensatory and punitive damages. Hogner and NAU (hereinafter collectively referred to as Hogner) stipulated to liability, but disputed the Strenkes' damages. The circuit court granted Hogner's motion to bifurcate the punitive damages claim from the compensatory damages claim. Subsequently, the jury awarded the Strenkes $2,000 in compensatory damages.

¶8. During the punitive damages trial, Hogner admitted that he had four prior convictions for driving while intoxicated. He further acknowledged that he consumed 16 to 18 twelve-ounce containers of beer within a five-hour span on the night of the accident.[5] However, Hogner testified that he had never injured anyone when drinking and did not intend to injure anyone on the date in question.

¶9. At the close of the testimony, Hogner moved for a directed verdict, asserting that the plaintiffs had not presented a prima facie case that he acted maliciously toward Strenke or intentionally disregarded Strenke's rights. The circuit court denied the motion, reasoning that while Hogner did not act maliciously toward Strenke, the jury could conclude that Hogner intentionally disregarded Strenke's rights.

¶10. According to the circuit court, Strenke was a member of a class of motorists that had rights. It determined that a jury could find that Hogner's intentional acts of drinking 16-18 twelve-ounce containers of beer, and then

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[5] Hogner, a male, weighed 400 pounds at the time of the accident.

driving while intoxicated, coupled with the fact that he had four prior OWI convictions, created a practical certainty that Strenke's rights would be disregarded.

¶11. The issue was submitted to the jury in two questions: (1) "Did Levi Hogner act maliciously toward LeRoy Strenke or in an intentional disregard of the rights of LeRoy Strenke?" and (2) "What sum, if any, do you assess against Levi Hogner as punitive damages?" The jury unanimously answered the first question "yes" and awarded the sum of $225,000, $200,000 more than the Strenkes had asked for in closing argument.

¶12. After the verdict, Hogner filed a motion for remittitur or, in the alternative, a new trial. The circuit court denied the motion, and Hogner appealed. The court of appeals certified the matter to this court.

II

¶13. The focus of our inquiry is Wis. Stat. § 895.85, the punitive damages statute. Interpretation of a statute presents a question of law subject to independent appellate review. *Vill. of Lannon v. Wood-Land Contractors, Inc.*, 2003 WI 150, ¶12, 267 Wis. 2d 158, 672 N.W.2d 275 (*citing Meyer v. School Dist. of Colby*, 226 Wis. 2d 704, 708, 595 N.W.2d 339 (1999)). Likewise, whether there is sufficient evidence to submit the question of punitive damages to the jury is also a question of law that is subject to independent appellate review. *Lievrouw v. Roth*, 157 Wis. 2d 332, 344, 459 N.W.2d 850 (Ct. App. 1990).

III

¶14. We begin our discussion with the statute at issue. Wisconsin Stat. § 895.85 was created by 1995 Wis. Act 17 and became effective on May 17, 1995. Subsection (3) of the statute provides:

> (3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

¶15. Prior to the enactment of Wis. Stat. § 895.85(3), the common law established the standard of conduct governing the imposition of punitive damages. Under it, punitive damages could be awarded for "outrageous" conduct. *Sharp v. Case Corp.*, 227 Wis. 2d 1, 21, 595 N.W.2d 380 (1999). A person's conduct was "outrageous" if the person acted "either maliciously or in wanton, willful and in reckless disregard of the plaintiff's rights." *Id.*

¶16. The words of Wis. Stat. § 895.85(3) derive, in large part, from the common law. The major difference between the two is that the legislature replaced the common law language of "wanton, willful and reckless" with the term "intentional." We address the import of this change in answering the first certified question: what proof is required for a plaintiff to recover punitive damages under the phrase "in an intentional disregard of the rights of the plaintiff" as provided in Wis. Stat. § 895.85(3)?

¶17. In *Wischer*, 267 Wis. 2d 638, ¶40, the court of appeals concluded that to intentionally disregard the rights of the plaintiff, a defendant was unambiguously required to have (1) a general intent to perform an act, and (2) either (i) a specific intent to cause injury by that act or (ii) knowledge that the act is practically certain to result in injury.

¶18. Relying on the *Wischer* decision, Hogner argues that the issue of punitive damages was improperly submitted to the jury in this case. He contends that no evidence exists that he knew that his acts were practically certain to result in Strenke being injured. As a result, he asserts that his intentional acts of drinking a large quantity of alcohol and then driving were not sufficient to prove that he intentionally disregarded Strenke's rights.

¶19. While we agree with Hogner's reading of *Wischer*, we disagree with the *Wischer* court's interpretation of Wis. Stat. § 895.85(3). The legislature did not intend an "intentional disregard of the rights of the plaintiff" to require "intent to cause injury to the plaintiff." Rather, it reaffirmed the common-law principle that punitive damages can be

premised on conduct that is a "disregard of rights." However, the legislature chose the word "intentional" to describe the heightened state of mind required of the defendant who disregards rights, instead of the common law's description of "wanton, willful and reckless." Our interpretation of Wis. Stat. § 895.85(3) is supported by the language of the statute, the legislative history, and the common law meaning of the phrase in question. We examine each in turn.

¶20. When interpreting a statute, we look first to its language. *Vill. of Lannon*, 267 Wis. 2d 158, ¶13. Here, the words at issue are: "in an intentional disregard of the rights of the plaintiff." Wis. Stat. § 895.85(3). The statute says nothing about "injury," or "harm," intentional or otherwise. Instead, it simply requires that the defendant engaged in conduct that constituted a "disregard of rights" that was "intentional." *Id.*

¶21. If the legislature had intended to specify an "intent to injure" requirement, it could have easily done so. Indeed, there was another statute enacted in the same legislative session in which Wis. Stat. § 895.85(3) was enacted that demonstrates this point. Wisconsin Stat. § 895.525(4m) was created by 1995 Wis. Act 447 and allows liability of contact sports participants only "if the participant who caused the injury acted recklessly or *with intent to cause injury*." (Emphasis added.) There is no comparable language in Wis. Stat. § 895.85(3). The words "intent to cause injury" appear nowhere in the text. Rather, the object of the intent as set forth in the text is the "disregard of the rights of the plaintiff." This court will not insert the phrase "intent to cause injury" into the statute. To do so here would alter the focus of the statute and jettison the legislative intent.

¶22. Although Hogner attempts to bolster his argument through the use of legislative history, his effort misses the mark. Both parties agree that the legislature tried to make it harder to recover punitive damages by passing Wis. Stat. § 895.85(3). We too subscribe to this construction. The analysis by the Legislative Reference Bureau indicates

that the bill "revises the standards and procedures for awarding punitive damages in certain civil cases." *See* Drafting Records of 1995 Wis. Act 17. To this end, the legislature replaced the common law language of "wanton, willful and reckless" with "intentional" to modify "disregard of the plaintiff's rights."

¶23. Thus, the question before this court is how much harder did the legislature make it? There is nothing in the drafting records of Wis. Stat. § 895.85(3) to suggest that the legislature intended to equate "intentional disregard of rights" with intent to injure or cause harm, as Hogner suggests. Furthermore, in referencing the floor debate on Senate Bill 11, which later evolved into Wis. Stat. § 95.85(3), Hogner ignores the most pointed exchange between legislators, which sheds light on the issue before this court.

¶24. Responding to Rep. Robson's question of whether the new law would allow the imposition of punitive damages against an intoxicated surgeon who amputates the wrong leg, Rep. Green, a sponsor of the bill, answered in the affirmative, a position that is difficult if not impossible to reconcile with Hogner's interpretation of the statute. Green stated:

> First off, I do believe that the current standard we are talking about in this bill would cover that situation. It is not the -- you don't have to prove an intent that the act took place. You have to prove instead, if you look at it, maliciousness which is the current standard or intentional disregard for plaintiff's rights -- *not the action being intentional, but disregard for plaintiff's rights.*

(Emphasis added.)

¶25. Examining Wis. Stat. § 895.85(3), it is evident that the legislature relied heavily on the common-law standard. Under the common law, punitive damages could be awarded if the defendant acted (1) maliciously, or (2) in

wanton, willful and in reckless disregard of the plaintiff's rights. *Sharp,* 227 Wis. 2d at 21.

¶26. The first category included conduct that was intended to cause the injury. Malicious conduct was defined as follows: "'[a]cts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended.'" *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 483, 464 N.W.2d 654 (1991) (quoting Wis JI--Civil 1707 (1990)).

¶27. The second category, however, did not require an intent to cause injury. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 267, 294 N.W.2d 437 (1980). In *Fahrenberg v. Tengel*, 96 Wis. 2d 211, 221, 291 N.W.2d 516 (1980), the court explained, "[t]o sustain an award for punitive damages, the law does not require a specific finding of an intentional and ruthless desire to injure, vex or annoy. The injured party need only show a wanton, willful or reckless disregard of the rights of others on the part of the wrongdoer." Similarly, in *Sharp*, 227 Wis. 2d at 21, the court observed, "[a] person's conduct is wanton, willful, and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on the person's part to the consequences of his or her actions, even though he or she may not intend insult or injury." This second category is where the change occurred. It now requires an intentional disregard of rights.

¶28. Not only did the legislature retain two categories of conduct, but it also used the specific common law phrase in question to describe the new second category--"disregard of rights." The legislature is presumed to act with full knowledge of existing case law when it enacts a statute. *Czapinski v. St. Francis Hosp.*, 2000 WI 80, ¶22, 236 Wis. 2d 316, 613 N.W.2d 120 (citing *Ziulkowski v. Nierengarten*, 210 Wis. 2d 98, 104, 565 N.W.2d 164 (1997)). A statute must be interpreted in light of the common law and the scheme of jurisprudence existing at the time of its enactment. *State v. Hansen*, 2001 WI 53, ¶19, 243 Wis. 2d 328, 627

N.W.2d 195 (*citing In re Custody of D.M.M.*, 137 Wis. 2d 375, 389-90, 404 N.W.2d 530 (1987)).

¶29. Statutes in derogation of the common law are to be strictly construed. *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶25, 244 Wis. 2d 758, 628 N.W.2d 833 (citing *Maxey v. Redev. Auth. of Racine*, 94 Wis. 2d 375, 399, 288 N.W.2d 794 (1980)). "A statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute." *Id.* "To accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory." *Id.* Because there is no such language in Wis. Stat. § 895.85(3) regarding the phrase "disregard of rights," we look to the common law to shed light on legislative intent.

¶30. Under the common law punitive damage cases, the word "rights" was used to mean just that--rights of the plaintiffs or others recognized by law. These can include, for example, such rights as property rights, *City of West Allis v. WEPCO*, 2001 WI App 226, 248 Wis. 2d 10, ¶26, 635 N.W.2d 873, the right to be protected from an excess verdict, *Allied Processors, Inc., v. Western Nat'l Mut. Ins. Co.*, 2001 WI App 129, ¶38, 246 Wis. 2d 579, 603, 629 N.W.2d 329, the right to be safe from physical injury, Sharp, 227 Wis. 2d at 21, or the right to a thorough investigation and evaluation of a claim, *Majorowicz v. Allied Mut. Ins. Co.*, 212 Wis. 2d 513, 533, 569 N.W.2d 472 (1997). In all of these instances, disregarding such rights resulted in punitive damages for the plaintiff.

¶31. A review of our common law reveals that the phrase "disregard of rights" described a type of conduct that involved an indifference on the defendant's part to the consequences of his or her actions. *Sharp*, 227 Wis. 2d at 21. The phrase did not mean the harm or injury suffered. Rather, it referred to conduct, which in turn resulted in the harm or injury suffered. *See id.* ("Punitive damages may be awarded in product liability suits if the plaintiff proves by clear and convincing evidence that the harm suffered was the result of

the manufacturer's reckless disregard for the safety of product users, consumers or others who might be harmed by the product.")

¶32. This interpretation is reiterated in the case law. For example, in *Brown v. Maxey*, 124 Wis. 2d 426, 434, 437, 369 N.W.2d 677 (1985), a premises liability case, the court did not require an intent to injure in order to determine that conduct was a "conscious disregard of rights." Moreover, in *Majorowicz*, 212 Wis. 2d at 533, a bad faith case, the court ruled that the insurer's conduct could lead the jury to find an "intentional disregard" of the plaintiff's rights even though there was no evidence of intent to cause injury.

¶33. Having examined the language of the statute, the legislative history, and the common law meaning of the phrase in question, we turn now to our interpretation of Wis. Stat. § 895.85(3). As noted above, the legislature tried to make it harder for plaintiffs to recover punitive damages. It accomplished this goal by replacing the common law language of "wanton, willful and reckless" with the term "intentional." In doing so, however, there is no indication that the legislature intended to alter the focus of punitive damages from the nature of the wrongdoer's conduct to the likelihood of an injury and requiring a certain probability of injury. Such a dramatic change would have to be clearly expressed in the language of the statute. *Fuchsgruber*, 244 Wis. 2d 758, ¶25. As there is no clear, unambiguous, and peremptory language in Wis. Stat. § 895.85(3), this court cannot impute such intent. *Id.*

¶34. Admittedly, part of the problem with interpreting the legislature's change stems from the fact that the words "intentional" and "disregard" do not easily combine. Still, we are not persuaded by the interpretation of the *Wischer* court, which inserted words into the statute. Accordingly, we overrule that decision here. We instead conclude that the legislature intended to require an increased level of consciousness and deliberateness at which the

defendant must disregard the plaintiff's rights in order to be subject to punitive damages.

¶35. Because the word "intentional" is not defined in the statute, we look to other sources for guidance. Restatement (Second) of Torts §8A (1965) states that the word "intent" denotes "that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." In *Shepard v. Outagamie County Circuit Court*, 189 Wis. 2d 279, 286-87, 525 N.W.2d 764 (Ct. App. 1994), the court defined intentional" as follows:

> The legal definition of "intentional" is essentially the same, whether found in tort law or in criminal law . . . . A person may be said to have intentionally caused the result where the result is substantially certain to occur from the actor's conduct. (Citation omitted.) The definition of "intentionally" in the criminal code, § 939.23(3), STATS., is similar:
>
> "Intentionally" means that the actor either has specified a purpose to do the thing or cause the result specified, or is aware that his conduct or her conduct is practically certain to cause that result.

¶36. In light of these authorities, we determine that a result or consequence is intentional if the person acts with a purpose to cause the result or consequence or is aware that the result or consequence is substantially certain to occur from the person's conduct.[6] The result or consequence here

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[6] *As Shepard v. Outagamie County Circuit Court*, 189 Wis. 2d 279, 287, 525 N.W.2d 764 (Ct. App. 1994) noted, the definition of "intentional" found in tort is "similar" to the criminal law definition of "intentional." In this opinion, we do not use the "practically certain" language of the criminal statute, but rather retain the "substantially certain" language cited above. This change does not affect the jury verdict in this case. For use of the term "substantially certain," see Restatement (Second) of Torts §8A (1965); *Gouger v. Hardtke*, 167 Wis. 2d 504, 512, 482 N.W.2d 84 (1992).

is the disregard of rights. Applying this definition to Wis. Stat. § 895.85(3), we conclude that the statute's requirement that the defendant act "in an intentional disregard of the rights of the plaintiff" necessitates that the defendant act with a purpose to disregard the plaintiff's rights or be aware that his or her conduct is substantially certain to result in the plaintiff's rights being disregarded.

¶37. Our analysis is consistent with that of the Civil Jury Instructions Committee. The Committee drafted Wis JI--Civil 1707.1 to give the following meaning to the statutory phrase: "A person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded." Notably, there is no requirement of intent to injure or cause harm in the instruction. Rather, the focus is on the disregard of rights.

¶38. Thus, in response to the first question certified by the court of appeals, we conclude that a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. This will require that an act or course of conduct be deliberate. Additionally, the act or conduct must actually disregard the rights of the plaintiff, whether it be a right to safety, health or life, a property right, or some other right. Finally, the act or conduct must be sufficiently aggravated to warrant punishment by punitive damages.

¶39. In recognizing this heightened standard, we are mindful that some cases which have previously qualified for punitive damages under the common law will no longer qualify under Wis. Stat. § 895.85(3). Under the prior common law standard, it was accepted that "the vast majority of negligence cases do not give rise to the remedy of punitive damages." Brown, 124 Wis. 2d at 432. The legislature intended with the heightened standard that now there would

be even fewer negligence cases giving rise to punitive damages.

¶40. Accordingly, we expect circuit courts to serve as gatekeepers before sending a question on punitive damages to the jury. We stated this gatekeeper function in *Bank of Sun Prairie v. Esser*, 155 Wis. 2d 724, 735, 456 N.W.2d 585 (1990) (citing *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 70, 126 N.W. 554 (1910)) as follows:

> The circuit court should not submit the issue of punitive damages to the jury in the absence of evidence warranting a conclusion to a reasonable certainty that the party against whom punitive damages may be awarded acted with the requisite . . . conduct.

¶41. The court of appeals in *Lievrouw*, 157 Wis. 2d at 344, restated this articulation of the gatekeeper's function as follows:

> Stated another way, a question on punitive damages may not be given to the jury unless the trial court concludes that a reasonable jury could find from the evidence that entitlement to punitive damages has been proven by the middle burden of proof, "clear and convincing evidence."

¶42. When serving in this capacity, we remind circuit courts that punitive damages are not recoverable if the wrongdoer's conduct is merely negligent. *Wangen*, 97 Wis. 2d at 275. Furthermore, not every drunk driving case will give rise to punitive damages. Only when the conduct is so aggravated that it meets the elevated standard of an "intentional disregard of rights" should a circuit court send the issue to a jury.

IV

¶43. We turn next to the second question in the court of appeals' certification: must a defendant's conduct giving rise to punitive damages have been directed at the specific plaintiff seeking punitive damages?

¶44. As noted above, Wis. Stat. § 895.85(3) provides:

> (3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

¶45. The word "plaintiff" is defined as "the party seeking to recover punitive damages." Wis. Stat. § 895.85(1)(c). From this definition, the federal district court in *Boomsma v. Star Transport, Inc.*, 202 F. Supp. 2d 869, 881 (E.D. Wis. 2002) opined that in order for punitive damages to be available, the defendant must have intended to harm a particular plaintiff.

¶46. In *Boomsma*, representatives of the estates of five decedents killed in a motor vehicle accident sued a trucking company and its employee driver. The court surmised that, "the thing which must be practically certain is not harm in the abstract, or even harm to a certain class of people (e.g., other drivers on the road), but harm *to the plaintiff*." *Id.* Relying on this interpretation, Hogner argues that Strenke's claim must fail, as no evidence exists that Hogner's conduct was specifically directed at Strenke.

¶47. In its certification, the court of appeals questioned the soundness of the *Boomsma* approach. Certification by Court of Appeals of Wisconsin, *Strenke v. Hogner*, 03-2527, filed May 18, 2004, p. 5. It feared that such a literal reading of the statute would defeat the purpose of punitive damages of punishing wrongdoers and deterring similar conduct in the future. *Id.*, p. 6. The court then cited several examples to illustrate the dramatic curtailment that the "particular plaintiff" rule would have on situations where punitive damages were always understood to play an important role:

> Consider where a drug manufacturer publicly distributes a drug it knows is practically certain to cause harm. Even though the class of people who use the drugs are harmed and that the manufacturer knew this was practically certain to occur, the drug

> manufacturer could simply use the plain language of § 895.85(3)--language Wischer concluded was unambiguous--to preclude liability, arguing that it did not intend or know there was a practical certainty that those particular plaintiffs who are seeking to recover punitive damages would be harmed. Also, consider where a person fires a gun into a crowd of people and injures a stranger. How could the person have awareness that it is practically certain he or she would cause injury to someone he or she never knew?

Id. (Emphasis in original.)

¶48. We share the court of appeals' concern with the *Boomsma* interpretation and reject it here.[7] Laws must be interpreted, considering the legal and practical consequences, to avoid unreasonable and absurd results. *State v. Jennings*, 2003 WI 10, ¶11, 259 Wis. 2d 523, 657 N.W.2d 393. It is doubtful the legislature intended to afford greater protection to a defendant who intentionally disregarded the rights of a great many unspecified individuals than a defendant who intentionally disregarded the rights of one particular individual. Our conclusion is supported by both the common law and legislative history.

¶49. Under the common law's "disregard of rights" standard, the "disregard" was "of the plaintiff's rights." *Sharp*, 227 Wis. 2d at 21. Despite this fact, punitive damages were available in products liability cases where no showing was made that the manufacturer's conduct was specifically directed at the particular plaintiff. *E.g., Sharp*, 227 Wis. 2d 1; *Walter v. Cessna Aircraft Co.*, 121 Wis. 2d 221, 358 N.W.2d 816 (Ct. App. 1984); *Wussow v. Commercial Mechanisms, Inc.*, 97 Wis. 2d 136, 293 N.W.2d 897 (1980).

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[7] We note that we are not alone in rejecting the *Boomsma* approach. At oral argument in *Wischer v. Mitsubishi Heavy Indus. Am., Inc.*, 2005 WI 26, __ Wis. 2d __, __ N.W.2d__, counsel for Mitsubishi characterized the interpretation as "extreme."

Instead, it was enough to show "by clear and convincing evidence that the harm suffered was the result of the manufacturer's reckless disregard for the safety of product users, consumers or others who might be harmed by the product." *Sharp*, 227 Wis. 2d at 21.

¶50. The silence of the legislative history on this matter is also significant. If the legislature had truly intended such a sea change in the law, we would expect to find something in the history of Wis. Stat. § 895.85(3) to indicate that. Yet, at oral argument, counsel for Hogner acknowledged that she could not point to anything in the drafting records to support her position. Our examination of the legislative history yields the same result.

¶51. Accordingly, for the reasons stated above, we determine that a defendant's conduct giving rise to punitive damages need not be directed at the specific plaintiff seeking punitive damages in order to recover under the statute.

V

¶52. Having answered the first two questions of the certification, we turn finally to the third question: if there was sufficient evidence to submit a punitive damages question to the jury, is the jury's punitive damage award excessive and therefore in violation of Hogner's due process rights? We begin by considering the sufficiency of the evidence.

¶53. Under the common law standard, drunk driving was the type of conduct that could support an award of punitive damages in an appropriate case. *Lievrouw*, 157 Wis. 2d at 347. In *Lievrouw*, the court of appeals observed that, "[d]runk driving is a terrible scourge," and "[i]ntentionally driving while alcohol-impaired is the type of outrageous conduct that punitive damages should punish and can deter." *Id.* at 345-46.

¶54. Although the standard of conduct for punitive damages has been heightened with Wis. Stat. § 895.85(3), we are satisfied that there was sufficient evidence that Hogner was aware that his conduct was substantially certain

to cause a disregard of Strenke's rights. There are several reasons for this.

¶55. First, Hogner's acts of drinking 16 to 18 twelve-ounce containers of beer and then driving while intoxicated were deliberate. As noted by the circuit court, "nobody was holding him down and pouring these [drinks] down his throat involuntarily . . . ." Similarly, there is no evidence in the record that anybody made Hogner get behind the wheel of his car that night.

¶56. Second, Hogner's act of drinking and driving disregarded Strenke's right to safety in using the highway with other motorists in sober command of their vehicles. While Hogner may not have targeted Strenke personally, his intentional disregard of the rights of *all* motorists on the road necessarily implicated Strenke's rights. The fact that his blood alcohol content was tested to be .269% confirms this.

¶57. Third, Hogner's conduct was sufficiently aggravated to warrant punishment by punitive damages. Here, Hogner admitted that he had four prior convictions for driving while intoxicated. He further acknowledged that he consumed 16 to 18 twelve-ounce containers of beer within a five-hour span on the night of the accident.

¶58. Thus, we conclude that there was sufficient evidence to submit the issue of punitive damages to the jury. However, we are equally divided on the question of whether the jury's punitive damage award was excessive and therefore in violation of Hogner's due process rights. Chief Justice Shirley S. Abrahamson, Justice Ann Walsh Bradley, and Justice Patience D. Roggensack would answer the question in the negative; Justice Jon P. Wilcox, Justice N. Patrick Crooks, and Justice Louis B. Butler, Jr. would answer the question in the affirmative. Justice David T. Prosser, Jr. did not participate. Accordingly, we remand this matter to the court of appeals to decide the issue consistent with the principles set forth in *Trinity*, 261 Wis. 2d 333.

VI

¶59. In sum, we conclude that a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. Furthermore, we determine that a defendant's conduct giving rise to punitive damages need not be directed at the specific plaintiff seeking punitive damages in order to recover under the statute.

¶60. However, we are equally divided on the question of whether the jury's punitive damage award was excessive and therefore in violation of Hogner's due process rights. Accordingly, we affirm the judgment of the circuit court in part and remand to the court of appeals to decide this remaining issue consistent with the principles set forth in *Trinity*, 261 Wis. 2d 333.

The judgment of the circuit court is affirmed in part and the cause is remanded to the court of appeals.

¶61. DAVID T. PROSSER, J. did not participate.

¶62. JON P. WILCOX, J. (*concurring*). While I agree with the ultimate result the majority reaches, the majority's analysis of Wis. Stat. § 895.85(3) (2001-02)[1] ignores accepted canons of statutory construction, misconstrues our common law relating to punitive damages, and adopts an interpretation of § 895.85(3) that is virtually identical to, if not lower than, the common-law standard for punitive damages. In doing so, the majority turns on its head what the legislature clearly intended as a heightened standard governing the recovery of punitive damages.

¶63. To answer the questions certified by the court of appeals, I would hold as follows: 1) Section 895.85(3) requires that the defendant intend the consequences of his actions--that is, intend to harm the plaintiff--in order to

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

be liable for punitive damages; 2) Pursuant to § 895.85(1)(c), the defendant's conduct must be directed at the person seeking to recover punitive damages; and 3) There exists sufficient evidence for a reasonable jury to conclude that the requirements of § 895.85 have been met in this case. Therefore, I respectfully concur.

I

¶64. Section 895.85 was enacted pursuant to 1995 Wis. Act 17 as part of a broader, comprehensive tort reform package passed by the legislature.[2] Section 895.85 significantly modified the circumstances under which punitive damages could be awarded. It is widely accepted that § 895.85(3) "was clearly intended to be more narrow than the case law standard . . . ." Wis JI-Civil 1707.1 cmt. 2 (1995). "The intent of the legislature to heighten the standard for recovery of punitive damages could not be clearer. . . . It is clear from the text of the statute that Section 895.85 marks a significant departure from the common law standard." *Boomsma v. Star Transp., Inc.*, 202 F. Supp. 2d 869, 880 (E.D. Wis. 2002).

¶65. Under the common law, punitive damages were allowed in two categories of tort cases. Punitive damages were allowed if the defendant "acted maliciously." *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 300, 294 N.W.2d 437 (1980). However, malicious conduct was not required, and punitive damages were also available if there was "a showing of wanton, wilful, or reckless disregard of the plaintiff's rights." *Kink v. Combs*, 28 Wis. 2d 65, 79, 135 N.W.2d 789 (1965). This court used the shorthand "'outrageous'" to refer to both types of conduct giving rise to an award of punitive damages. *Brown v. Maxey*, 124 Wis. 2d 426, 433, 369 N.W.2d 677 (1985)(*quoting Wangen*, 97 Wis. 2d at 300).

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[2] *See* Wisconsin Legislative Council Staff, *Information Memorandum 96-25: Legislation Relating to Liability and Insurance Enacted During the 1995-96 Legislative Session* (July 26, 1996).

¶66. In contrast to the common-law standard, § 895.85(3) provides: "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." Thus, the legislature removed the possibility of awarding damages in cases where the defendant "willfully, wantonly, or recklessly disregarded the plaintiff's rights" and instead required that there be a showing that the defendant acted in an "intentional disregard of the rights of the plaintiff." The dispute in this case concerns the proper meaning of the phrase "intentional disregard of the rights of the plaintiff."

¶67. Pursuant to Wis. Stat. § 990.01, when construing a statute, "technical terms or legal terms of art are given their accepted legal or technical definitions." *Wis. Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶6, 270 Wis. 2d 318, 677 N.W.2d 612. Further, "[t]he legislature is presumed to act with knowledge of the existing case law." *Maurin v. Hall*, 2004 WI 100, ¶75, 274 Wis. 2d 28, 682 N.W.2d 866 *(citing Reiter v. Dyken*, 95 Wis. 2d 461, 471, 290 N.W.2d 510 (1980)). As noted, the common law allowed punitive damages upon "a showing of wanton, wilful, or reckless disregard of the plaintiff's rights." *Kink*, 28 Wis. 2d at 79. The majority admits that the phrase "wanton, willful, or reckless disregard of the plaintiff's rights" had an accepted legal meaning under the common law, majority op., ¶¶25-28, and that the legislature "relied heavily" on this meaning when drafting § 895.85(3). Majority op., ¶25. Thus, it is necessary to understand the meaning of the common-law standard before addressing the effect of § 895.85 on the availability of punitive damages.

¶68. As the following discussion will demonstrate, the common law referred to "a disregard of the plaintiff's rights" as a shorthand for describing all of the various types of harm giving rise to punitive damages when coupled with the appropriate mental state of the defendant. However, the common law required more than a showing that the

defendant recklessly disregarded the plaintiff's "rights" in the abstract in each particular case. *Contra* majority op., ¶30. Rather, the phrase "willful, wanton, or reckless disregard of rights" meant that the defendant engaged in a volitional act with knowledge or appreciation that his conduct created an unreasonable risk of harm and that there was a strong probability that harm would result. Thus, "a disregard of the plaintiff's rights" referred to the harm caused by the defendant's conduct and "willful, wanton, or reckless" referred to the defendant's knowledge of the likelihood of harm--his knowledge that such conduct created a "strong probability" that harm would result. While "an intent to injure" was not required, the common law did specifically link the defendant's conduct with his knowledge of the likelihood of harm.

¶69. As noted, punitive damages were available under Wisconsin common law if the plaintiff demonstrated "malicious conduct or willful or wanton conduct in reckless disregard of rights or interests." *Wangen*, 97 Wis. 2d at 267. In summarizing the various common-law standards for the imposition of punitive damages, including Wisconsin's, Professors Ghiardi and Kircher, in their treatise on punitive damages, commented:

> The conduct which the varying terms describes is generally of two distinct types. With the first the defendant desires to cause the harm sustained by the plaintiff, or believes that the harm is substantially certain to follow the conduct. *With the second the defendant knows, or should have reason to know, not only that the conduct creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty, that the harm will result* and, nevertheless, proceeds with the conduct in reckless or conscious disregard of the consequences.

> Neither form of conduct, therefore, involves mere inadvertence or what, in the traditional tort sense, would be called ordinary negligence.

James D. Ghiardi & John J. Kircher, 1 *Punitive Damages L. & Prac.* § 5.01, at 8 (1996)(emphasis added).

¶70. This passage from the Ghiardi and Kircher treatise on punitive damages, which was present in previous editions, was relied on and cited with approval numerous times by this court when discussing the circumstances under which punitive damages could be awarded under Wisconsin common law. *See, e.g., Loveridge v. Chartier,* 161 Wis. 2d 150, 188, 468 N.W.2d 146 (1991); Maxey, 124 Wis. 2d at 433-34; *Lundin v. Shimanski*, 124 Wis. 2d 175, 197 n.14, 368 N.W.2d 676 (1985). It was also incorporated into the commentary of our jury instructions describing the requisite conduct for punitive damages in 1986 and remained until the passage of 1995 Wis. Act 17.[3]

¶71. In *Wangen,* when describing the type of conduct necessary to justify punitive damages, we stated:

> "[S]omething must be shown over and above the mere breach of duty for which compensatory damages can be given. That is, a showing of a bad intent deserving punishment, or something in the nature of special ill will towards the person injured, or a wanton, *deliberate disregard of the particular duty then being breached, or that which resembles gross as distinguished from ordinary negligence.*"

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[3] *See* Wis JI-Civil 1707 (1986); Wis JI-Civil 1707 (1989); Wis JI-Civil 1707 (1990); Wis JI-Civil 1707 (1991); Wis JI-Civil 1707 (1992); Wis JI-Civil 1707 (1994); Wis JI-Civil 1707 (1995).

Wangen, 97 Wis. 2d at 268 (*quoting Meshane v. Second Street Co.*, 197 Wis. 382, 387, 222 N.W. 320 (1928))(emphasis added).[4] In addition, we noted that the requisite conduct for punitive damages was similar to "conduct falling within the old gross negligence concept," a concept that we had previously described as "'a willingness to harm although such harm may not have been intended,' or '*willingness to perpetrate injury*,' or '*a purpose to take known chances of perpetrating an injury*.'" *Id.* at 274 (quoting *Bielski v. Schulze*, 16 Wis. 2d 1, 14-15, 114 N.W.2d 105 (1962))(emphasis added).[5]

¶72. Furthermore, relying on the Restatement (Second) of Torts § 908 cmt. b. (1977), we stated that punitive damages were allowed when the defendant's conduct demonstrated a "reckless indifference or disregard of the rights of others." *Wangen*, 97 Wis. 2d at 267. The Restatement (Second) of Torts § 908 cmt. b specifically refers to § 500 of the Restatement (Second) to define "reckless indifference to the rights of others." In turn, the

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[4] *See also* James D. Ghiardi, *Punitive Damages in Wisconsin*, 60 Marq. L. Rev. 753, 758 (1977)(equating the phrase "wanton, wilful, or reckless disregard of the plaintiff's rights" with "what was formerly categorized as gross negligence").

[5] Professor Prosser noted that under the common law, "wilful," "wanton," or "reckless" conduct was sufficient to justify punitive damages. William L. Prosser, *Handbook of The Law of Torts* § 34, at 184 (4th ed. 1971). He described all three terms as referring to the same type of conduct:

> [T]he actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to be aware of it, and so great as to make it *highly probable that harm would follow*. It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingness that they shall follow . . . ."

Id. § 34, at 185 (emphasis added). In addition, he commented that "'wilful,' 'wanton' or 'reckless' conduct" was synonymous with "'gross' negligence." *Id.*

Restatement (Second) of Torts § 500 (1965), provides that a person's conduct is in "reckless disregard of safety" if:

> [H]e does an act or intentionally fails to do an act which it is his duty to the other to do, *knowing or having reason to know* of facts which would lead a reasonable man to realize, not only *that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.*

Restatement (Second) of Torts § 500.[6]

¶73. As such, our jurisprudence involving punitive damages focused on the nature of the defendant's conduct and the defendant's knowledge of the likelihood of harm that resulted from his conduct. We utilized the phrase "disregard of rights" rather than "disregard of safety" when referring to the type of conduct sufficient to give rise to punitive damages generally because punitive damages were not restricted to cases involving physical injury. However, in each case, our analysis focused on the defendant's awareness of the likelihood of some type of harm, rather than the likelihood of a violation of the plaintiff's rights in the abstract.

¶74. For instance, in *Wangen*, 97 Wis. 2d at 263, the plaintiffs were severely injured when the fuel tank of their

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[6] The Restatement also noted that conduct in reckless disregard of safety is equivalent to "'wanton or wilful misconduct.'" Restatement (Second) of Torts § 500, Special Note. Notably, this court in *Sharp v. Case Corp.*, 227 Wis. 2d 1, 21, 595 N.W.2d 380 (1999), utilized the "reckless disregard of safety" standard to allow for punitive damages in a products liability case. Specifically, the court stated that the manufacturer recklessly disregarded the safety of those who might be harmed by the product." The majority's characterization of the common-law standard for punitive damages, majority op., ¶31, is difficult to reconcile with the explanation of the phrase "reckless disregard of safety" in Restatement (Second) of Torts § 500.

automobile ruptured following a collision. We held that the plaintiffs pled sufficient facts to support a claim of punitive damages because the facts "portray[ed] conduct which is willful and wanton and in reckless disregard of the plaintiff's rights." *Id.* at 309.

¶75. Our analysis focused on the fact that the complaint alleged that the vehicle manufacturer, Ford: "*knew of the defects in the design of the gas tank . . . and of the fire hazard associated with the design*"; knew "*that these defects were causing serious burn injuries to occupants* of these and similar cars"; knew "how to correct these defects in ways that would have prevented the plaintiffs' burns"; intentionally concealed this knowledge from the government and the public"; and that despite this knowledge, "deliberately chose not to recall" its defective vehicles. *Id.* at 309 (emphasis added). Thus, our discussion concentrated on the defendant's knowledge of the risk of fire and the likelihood of physical injury to occupants as a result of its failure to change the fuel tank design.

¶76. Likewise, in *Maxey*, 124 Wis. 2d at 429, a tenant in an apartment complex was burned as a result of an apartment fire. In assessing whether punitive damages were appropriate, we noted that "we focus on the defendant's knowledge and state of mind at the time of the fire" to determine whether his "conduct evidences a reckless indifference to or disregard of the plaintiff's rights." *Id.* at 434 (emphasis added). Before analyzing the defendant's conduct, we set forth the aforementioned passage from Professors Ghiardi and Kircher's treatise to explain the requisite "conduct justifying punitive damages." *Id.* at 433-34.

¶77. Applying this standard to the facts, we noted that the evidence demonstrated the following: there were numerous instances of fires started by vandals in the apartment complex in the months preceding the injury; the complex was not properly outfitted with locks and other safety mechanisms; there were numerous instances of other

vandalism during the weeknights and weekends and that there was no security staff employed during these times; the fire alarm system in the complex was often inoperable; the fire danger was so high that tenants had formed their own security squad; and the defendant had knowledge of these facts and the risk of fire and yet did nothing. *Id.* at 434-37.

¶78. We allowed recovery of punitive damages from the landlord because:

> the conduct of the defendant evidenced more than a lack of ordinary care. Given [the landlord's] *knowledge with respect to the security problems and the history of fires* at Apollo Village and *his conscious refusal to reduce the risk of fires*, we do not hesitate to hold there is credible evidence from which the jury could reasonably conclude that [the landlord's] conduct evidences a *reckless disregard of the rights and safety* of [the plaintiff]. Based upon the evidence concerning [the landlord's] failure to take action, it is reasonable to conclude that [*the landlord*] *proceeded with a reckless and conscious disregard of the grave consequences involved with such conduct.*

Id. at 437 (emphasis added). Thus, in *Maxey*, our analysis again focused on the defendant's knowledge of the likelihood of harm that actually occurred.

¶79. In *Loveridge*, 161 Wis. 2d at 162-63, the defendant passed the herpes simplex virus to the plaintiff, an underage co-worker, after performing various consensual acts of cunnilingus. The record indicated that the defendant had a history of cold sores and that such sores were present during the time he engaged in the illicit sexual contact with the plaintiff. *Id.* at 163. The record also indicated that the defendant did not know the herpes virus could be transmitted by cold sores, although he knew there was a "vague connection" between the two. *Id.*

¶80. On appeal, the defendant's insurer argued that the circuit court erred in submitting the question of punitive damages to the jury. *Id.* at 187. This court agreed and

concluded that the case was not appropriate for the imposition of punitive damages. *Id.* at 192. In so holding, we discussed the circumstances under which punitive damages are available in Wisconsin. *Id.* at 188-92.

¶81. We noted that under *Maxey*, a defendant's conduct justifies punitive damages in two circumstances. *Id.* at 188. The first is where the defendant subjectively intends to injure or harm the plaintiff. *Id.* at 189. The second is where "the *defendant knew or should have known that his or her conduct created an unreasonable and strong probability of harm.*" *Id.* at 191 (emphasis added). Thus, again focusing on the defendant's knowledge of the likelihood of harm, we stated that this standard could be met if there was evidence that "*Chartier knew that his sexual contact with Loveridge created 'a strong probability, although not a substantial certainty,' that Loveridge would be injured or harmed.*" *Id.* at 190 (*quoting Maxey*, 124 Wis. 2d at 433)(emphasis added).

¶82. In concluding that this second standard was not met, we reasoned: "there was unrebutted and undisputed testimony that Chartier did not know that the herpes virus could be spread from a cold sore on the mouth to the vagina during cunnilingus." *Id.* at 191. Further, we stated that there was not sufficient evidence that he "should have known" that herpes could be spread via a cold sore on his mouth during cunnilingus. *Id.* at 192.

¶83. Thus, the majority is simply wrong when it states that the common law did not consider the defendant's knowledge of the likelihood of harm as part of the "nature of the wrongdoer's conduct." Majority op., ¶33. As demonstrated above, while our jurisprudence spoke of a "disregard of rights" generally in referring to the type of conduct necessary for punitive damages, in each case, we analyzed the nature of the defendant's conduct and the defendant's awareness of the likelihood of harm inflicted, rather than the likelihood of a violation of the plaintiff's rights in the abstract. In sum, we allowed for punitive damages where it was evident that the defendant:

> kn[ew], or should have [had] reason to know, not only that the conduct create[d] an unreasonable risk of harm, but also that there [was at least] a strong probability . . . that the harm w[ould] result and [the defendant], nevertheless, proceed[ed] with the conduct in reckless or conscious disregard of the consequences.

James D. Ghiardi & John J. Kircher, 1 *Punitive Damages L. & Prac.* § 5.01, at 8 (1996).

¶84. The majority is incorrect that the common law did not link the wrongdoer's conduct to the likelihood of harm and his knowledge thereof. *See* majority op., ¶¶31-33. In *Wangen*, we analyzed the defendant's knowledge of the likelihood of fuel tank rupture and burn injuries as a result of its failure to correct a design flaw in the fuel tank. In *Maxey*, we analyzed the defendant's knowledge of the likelihood of vandalism and fire as a result of his failure to provide adequate security and fire alarms. Similarly, in *Loveridge*, we inquired into the defendant's knowledge of the likelihood that he could spread a sexually transmitted disease.[7]

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[7] The error of the majority's interpretation of our common law relating to punitive damages is apparent if one considers Loveridge v. Chartier, 161 Wis. 2d 150, 468 N.W.2d 146 (1991). If the common law did not require a link between the nature of the defendant's conduct and the probability of harm, then punitive damages should have been allowed in *Loveridge*. Yet, in concluding that the defendant's conduct did not rise to a level that justified punitive damages in that case, this court clearly stated that punitive damages would be warranted if "Chartier knew that his sexual contact with Loveridge created 'a strong probability, although not a substantial certainty,' that Loveridge would be injured or harmed." *Id.* at 190 (*quoting Brown v. Maxey*, 124 Wis. 2d 426, 433, 369 N.W.2d 677 (1985)). We concluded that punitive damages were inappropriate because the evidence demonstrated "Chartier did not know that the herpes virus could be spread from a cold sore on the mouth to the vagina during cunnilingus." *Id.* at 191.

If the majority's interpretation of the common-law meaning of "willful, wanton, or reckless disregard of rights" was correct, then punitive damages clearly should have been allowed in *Loveridge* because the evidence showed that Chartier knew he had cold sores when he

¶85. As these cases demonstrate, punitive damages were allowed under the common law if the defendant acted with knowledge or appreciation that his conduct created an unreasonable risk of harm and that there was a strong probability that harm would result. While the phrase "rights of others" was used in a general sense to include the various types of injuries that could give rise to punitive damages, in each case, we focused on the particular harm caused by the defendant's conduct.[8] The phrase "willful, wanton, or reckless" referred to the defendant's knowledge of the likelihood of harm--his knowledge that his conduct created at least a "strong probability" that harm would result.

¶86. Therefore, there was no need for the legislature to specify "injury" or "harm" when it enacted § 895.85(3), majority op., ¶20, because under the common law, it was understood that "disregard of the plaintiff's rights" referred to

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engaged in sexual acts with the plaintiff and knew there was some link between cold sores and the herpes virus. *Id.* at 163. Thus, were the majority correct that it was sufficient to merely disregard abstract rights, our analysis would have noted that Chartier's conduct demonstrated a reckless indifference to the plaintiff's "right" to be free from sexually transmitted diseases. However, we instead concluded that punitive damages were not appropriate because the evidence did not demonstrate that "Chartier knew that his sexual contact with Loveridge created 'a strong probability, although not a substantial certainty,' that Loveridge would be injured or harmed." Id. at 190 (*quoting Maxey*, 124 Wis. 2d at 433).

[8] For instance, in *Jacque v. Steenberg Homes, Inc.*, 209 Wis. 2d 605, 619-20, 563 N.W.2d 154 (1997), this court allowed an award of punitive damages where the defendant company committed an intentional trespass by moving a mobile home over the plaintiffs' property, despite the fact that the plaintiffs had explicitly refused permission to cross their land, because of "[t]he potential for harm resulting from intentional trespass" and because the defendant's intentional trespass "caused actual harm."

the harm caused by the defendant's conduct in each particular case. As such, when the legislature created § 895.85(3) to allow punitive damages if "the defendant acted . . . in an intentional disregard of the rights of the plaintiff," it heightened the state of mind required of the actor and left intact the link between the actor's state of mind and the likelihood of the harm.

¶87. Thus, with the enactment of § 895.85, it is no longer sufficient for the defendant to know or have reason to know "that the conduct creates an unreasonable risk of harm, [and] also that there is a strong probability, although not a substantial certainty, that the harm will result." James D. Ghiardi & John J. Kircher, 1 *Punitive Damages L. & Prac.* § 5.01, at 8 (1996). Rather, following the enactment of § 895.85, it *is* necessary that the defendant have knowledge that there is a "substantial certainty" that harm will result from his conduct. This conclusion flows naturally from the legislature's removal of punitive damages where the wrongdoer's mental state was "wanton, willful or reckless" and its restriction of punitive damages to where the actor's mental state was "intentional."

¶88. "The legal definition of 'intentional' is essentially the same whether found in tort law or in criminal law[:] . . . . A person may be said to have intentionally caused the result where the result is substantially certain to occur from the actor's conduct." *Shepard v. Outagamie County Circuit Court*, 189 Wis. 2d 279, 287, 525 N.W.2d 764 (Ct. App. 1994). In *Shepard*, the court of appeals adopted the definition of "intentionally" from the criminal code and applied it to the civil contempt statute. *Id.* Wisconsin Stat. § 939.23 provides: "'Intentionally' means that the actor has either a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." *See also* Restatement (Second) of Torts § 8A (1965)("The word 'intent' is used to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are

substantially certain to result from it."). Consistent with the focus of the common law on the nature of the wrongdoer's conduct and his knowledge of the risk of actual harm, the "consequence" that must be substantially certain, so as to make a wrongdoer's act "intentional" for purposes of § 895.85(3), is actual harm to the plaintiff.

¶89. Thus, while I agree with the majority that the phrase "wanton, willful, or reckless disregard of rights" under the common law referred to "an indifference on the defendant's part to the consequence of his or her actions[,]" majority op., ¶31, the "consequence" referred to was a great risk or substantial probability of harm. Following the enactment of § 895.85(3), a mere "indifference" to a great risk of harm is not sufficient to justify punitive damages. Rather, § 895.85(3) now requires, at a minimum, that the wrongdoer have knowledge that harm to the plaintiff is substantially certain to result as a consequence of his or her actions.

¶90. Therefore, to answer the first question posed by the court of appeals, I would conclude that § 895.85(3) requires that the defendant act for the purpose of causing harm to the plaintiff or with knowledge that harm is substantially certain to result from his conduct in order for punitive damages to be available.[9] This interpretation of § 895.85(3) does not "insert[] words into the statute[,]" majority op., ¶34; it merely recognizes the meaning and

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[9] Wisconsin Stat. § 895.85(3) also allows for the imposition of punitive damages if the "defendant acted maliciously toward the plaintiff." Maliciousness is a heightened state of intent that involves impure motives. "Malicious" is generally defined as "'[c]haracterized by, or involving, malice; having or done with, wicked, evil or mischievous intentions or motives[.]'" *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 484, 464 N.W.2d 654 (1991) (quoting, with approval, *Black's Law Dictionary* 958 (6th ed. 1990)). Further, "'[a]cts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended.'" *Id.* at 483 (*quoting, with approval,* Wis JI-Civil 1707 (1990)).

application of the phrase "wanton, willful or reckless disregard of the rights of the plaintiff" under the common law.

¶91. The majority, adopting the position set forth by the plaintiffs in *Wischer v. Mitsubishi Heavy Industries America, Inc.*, 2003 WI App 202, 267 Wis. 2d 638, 673 N.W.2d 303, concludes that the "result" that must be intended under § 895.85(3) is the "disregard of [the plaintiff's] rights," not the ultimate injury or harm. Majority op., ¶¶36, 38. This interpretation of § 895.85 suffers from several flaws.

¶92. First, the majority's interpretation is based on a misunderstanding of the common-law standard for punitive damages as discussed above. *See* majority op., ¶¶31-33. As emphasized previously, "[a] defendant's conduct [constituted a willful, wanton or reckless disregard of rights] only if the defendant knew or should have known that his or her conduct created an unreasonable and strong probability of *harm*." *Loveridge*, 161 Wis. 2d at 190-91 (emphasis added). At common law, we focused on the nature of the defendant's conduct and his knowledge of the risk of "*harm*." We did not ask whether the defendant knew or should have known that his conduct created an unreasonable and strong probability of a "*disregard of the rights of the plaintiff*" in the abstract.

¶93. If "disregard of rights" is to have the same meaning under § 895.85(3) as it did under the common law, save the change of the modifier "reckless" to "intentional," then the majority's interpretation of § 895.85(3) simply cannot be squared with the common law.[10] Rather than incorporating the common-law meaning of "disregard of the rights of the plaintiff" into § 895.83(3) and taking into account the change in the modifier from "wanton, willful, or

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[10] *See* majority op., ¶38 ("[A] person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded.").

reckless" to intentional," the majority grasps at straws, relying on a "pointed exchange between legislators" during the floor debate of the punitive damages legislation to support its position. Majority op., ¶23.

¶94. Next, despite the wide recognition that § 895.85 was intended to restrict the availability of punitive damages, the majority adopts an interpretation of § 895.85 that is virtually identical to its description of the common law "wanton, willful, or reckless" standard for recovery of punitive damages. The majority essentially concludes that the question of punitive damages may be submitted to the jury if the defendant's conduct demonstrates a deliberate indifference to the rights of the plaintiff. *See* majority op., ¶¶31, 34, 38. The United States Supreme Court has noted, albeit in a different context, that "[i]t is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk . . . is the equivalent of recklessly disregarding that risk." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). It appears as if the majority's interpretation of "intentional disregard of the rights of the plaintiff" in § 895.85(3) is no different than its characterization of the common-law standard. *Compare* majority op., ¶38 *with* majority op., ¶¶30-32.

¶95. In addition, the court of appeals in *Wischer* aptly noted that under the plaintiffs' interpretation of § 895.85(3), the interpretation that the majority adopts today, the standard for punitive damages is arguably *lower* under § 895.85(3) than it was under the common law. *Wischer*, 267 Wis. 2d 638, ¶42 ("[P]laintiffs' counsel admitted that his interpretation of the statute would expand rather than narrow the number of cases under which punitive damages could be awarded . . . . [P]laintiffs' counsel indicated that in his view of § 895.85(3), punitive damages under the *Loveridge* scenario *could be recovered*.")(emphasis in original). "[T]his interpretation of the statute . . . would expand the scope of punitive damages awards in clear contravention to the intent of the legislature when it enacted § 895.85(3)." *Id.*

¶96. Moreover, the court of appeals in *Wischer* noted the numerous cases in which punitive damages would be available if the position the majority takes today were adopted:

> [A]nyone who is negligent could be considered to be intentionally disregarding the rights of someone. Examples are numerous: someone who is drinking a cup of coffee while driving, or eating while driving, or adjusting the radio while driving, or even driving over the speed limit. In each of these examples, an injured plaintiff could argue that the tortfeasor driver intentionally disregarded the rights of the other drivers on the road, and thus justify a punitive damage award.

Id., ¶43. While the majority states that "[t]he legislature intended with the heightened standard that now there would be even fewer negligence cases giving rise to punitive damages[,]" majority op., ¶39, there is no principled reason why punitive damages would not be allowed in the above hypotheticals under the majority's interpretation of the statute.

¶97. In addition, the majority never satisfactorily defines the "rights" to which it is referring. The majority states, "the act or conduct must actually disregard the rights of the plaintiff, whether it be a right to safety, health or life, a property right, or some other right." Majority op., ¶38. What exactly are these "other" rights? Is the majority referring to constitutional rights, common-law rights, statutory rights, or rights yet to be recognized?

¶98. In an attempt to assuage these concerns, the majority ostensibly affixes additional prerequisites to the imposition of punitive damages. The majority states that in addition to constituting an intentional disregard of the plaintiff's rights under § 895.85(3), "the act or conduct must be sufficiently aggravated to warrant punishment by punitive damages." Majority op., ¶38. However, this "added requirement" is entirely illusory, as it is § 895.85 that

describes the level of aggravation sufficient to warrant punitive damages in the first place. The majority also cautions that "circuit courts [are] to serve as gatekeepers" in analyzing the conduct at issue and determining whether there was in fact an intentional disregard of rights, "before sending a question on punitive damages to the jury." Majority op., ¶40. This "gatekeeping function" was suggested by plaintiffs' counsel during oral argument before this court in the *Wischer* case. *Wischer v. Mitsubishi Heavy Indus. Am., Inc.*, 2005 WI 26, ___Wis. 2d ___, ___ N.W.2d ___. This "added requirement" is illusory as well. When asked what standards the circuit court should follow in administering its "gatekeeping function" and determining when punitive damages would be appropriate, counsel for the *Wischer* plaintiffs responded: "You'll know it when you see it."

¶99. This low threshold, focusing on "rights" in the abstract rather than the defendant's knowledge of the harm, has constitutional implications. The United States Supreme Court has stated: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment[.]" *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). Given the frequency with which individuals assert--and courts are apt to recognize--new "rights," one has to wonder how anyone can be put on fair notice as to what conduct subjects him to a punitive damage award under the majority's interpretation of the statute. Certainly, a "you'll know it when you see it" standard does not satisfy this basic constitutional requirement.

II

¶100. As to the second question certified by the court of appeals, I would conclude that, in accordance with § 895.85(1)(c), the defendant's conduct must be directed at the person seeking to recover punitive damages. This court recently reaffirmed the importance of adhering to the text of a statute:

> Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. . . . It is the enacted law, not the unenacted intent, that is binding on the public.

State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. To that extent, this court has stated: "Words that are defined in the statute are given the definition that the legislature has provided." *Wisconsin Citizens Concerned for Cranes and Doves*, 270 Wis. 2d 318, ¶6 (*citing Beard v. Lee Enters.*, 225 Wis. 2d 1, 23, 591 N.W.2d 156 (1999)).[11]

¶101. Wisconsin Stat. § 895.85(3) provides: "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." Wisconsin Stat. § 895.85(1)(c) defines "[p]laintiff" as: "the party seeking to recover punitive damages." Thus, when the statutory definition of "plaintiff" is read into § 895.85(3), the statute provides that punitive damages are available if "evidence is submitted showing that the defendant acted maliciously toward [the party seeking to recover punitive damages] or in an intentional disregard of the rights of [the party seeking to recover punitive damages]."

¶102. The statute could not be clearer. It plainly requires that the conduct giving rise to an award of punitive damages be directed at "the party seeking to recover punitive damages." The majority ignores the plain language of the

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[11] *See also Bosco v. LIRC*, 2004 WI 77, ¶23, 272 Wis. 2d 586, 681 N.W.2d 157 (accord); *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110 (accord).

statute and instead violates its own admonition against reading words into the statute by essentially concluding that it is sufficient if the defendant intentionally disregards the rights of a class of people to which the plaintiff belongs. *See* majority op., ¶56 ("While Hogner may not have targeted Strenke personally, his intentional disregard of the rights of *all* motorists on the road necessarily implicated Strenke's rights.")(emphasis in original).

¶103. The majority states that this result is more "reasonable" because there is nothing in the drafting records to support the contention that the defendant's actions must be directed at the particular plaintiff bringing the action. Majority op., ¶¶48-50.[12] However, there is no need to turn to the legislative history on this point; the legislature has unmistakably and explicitly determined what "the plaintiff" means in § 895.85. *See Kalal*, 271 Wis. 2d 633, ¶51 ("legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language").

¶104. While the majority states that "[l]aws must be interpreted, considering the legal and practical consequences," majority op., ¶48, this is nothing more than an artfully crafted euphemism invoked by the court to justify its willingness to disregard and undermine the plain meaning of a law that the people of this state have enacted when it disagrees with the policy implications of the statute. If the plain meaning of an unambiguous statute leads to

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[12] Notably, the majority states that its construction is "supported by . . . legislative history." Majority op., ¶48. However, the majority cites no legislative history to support its position; instead, it cites to the lack of legislative history in order to discount what the statute plainly says. Thus, the majority has gone one step beyond the increasingly common practice of utilizing legislative history to undermine the plain meaning of what the legislature has enacted as law; the majority actually uses the *absence* of legislative history to ignore the plain meaning of a duly enacted statute.

undesired results, the proper remedy is for the legislature to amend the statute, not for this court to refuse its solemn obligation to apply what the legislature has plainly enacted. *See generally Columbus Park Hous. Corp. v. City of Kenosha*, 2003 WI 143, 267 Wis. 2d 59, 671 N.W.2d 633. Rulings from this court must be based on more than subjective notions of practical politics for them to have any semblance of legitimacy as "law."

¶105. Therefore, in accordance with the plain meaning of "plaintiff" that the legislature provided in § 895.85(1)(c), I would conclude the conduct referred to in § 895.85(3) must be directed at "the party seeking to recover punitive damages" in order for punitive damages to be recoverable under the statute.

III

¶106. Despite my strong disagreement with the majority as to issues one and two, I nevertheless join the mandate of the majority opinion because I conclude that there is sufficient evidence regarding the defendant's conduct to submit a punitive damage question to the jury under a proper interpretation of the heightened standard for punitive damages in § 895.85(3).

¶107. The evidence presented to the jury during the punitive damages phase of the trial indicated that Mr. Hogner had consumed 16 to 18 beers over a five-hour period before the accident. Mr. Hogner testified that he had consumed a 12 pack of beer at home before going to a bar. He testified that while at the bar he consumed four to six more alcoholic drinks. When the accident occurred, Mr. Hogner was en route to another tavern with a companion in his vehicle. The jury was informed that Mr. Hogner had four previous convictions for drunk driving and that this was his fifth offense. The jury was informed that blood tests taken after the accident indicated that Mr. Hogner's blood alcohol content was .269.

¶108. Mr. Hogner testified that when the accident occurred he was attempting to make a left-hand turn at an

intersection. He testified that he saw other vehicles approaching and that he believed Mr. Strenke's vehicle was signaling a right-hand turn. Mr. Hogner testified that he thought he could make a left-hand turn before Mr. Strenke's vehicle made its turn. Mr. Hogner thus made a left-hand turn in front of Mr. Strenke's vehicle and, as a result, Mr. Strenke's vehicle struck Mr. Hogner's vehicle. Mr. Hogner testified that he did not intend to injure Mr. Strenke.

¶109. Given the evidence of the circumstances surrounding the accident, Mr. Hogner's state of intoxication, and Mr. Hogner's history of drunken driving offenses, I would conclude that a reasonable jury could find that Mr. Hogner knew that it was substantially certain that the driver of the oncoming vehicle would be injured as a result of his decision to make a left-hand turn in front of him. While Mr. Hogner testified that he did not intend to harm Mr. Strenke and believed he had sufficient time to complete a left-hand turn, "[i]ntent may be inferred from conduct." *Shepard*, 189 Wis. 2d at 287. A reasonable jury could infer, given his past convictions for drunken driving, that Mr. Hogner was aware of his level of intoxication after consuming 16 to 18 beers in a five-hour period and his resulting diminished capabilities of perception and judgment. A reasonable jury could conclude that Mr. Hogner made an intentional decision to turn in front of an oncoming car. A reasonable jury could further conclude that Mr. Hogner was aware that turning in front of an oncoming vehicle after consuming 16 to 18 alcoholic drinks was substantially certain to result in injury to the driver of the oncoming vehicle. Thus, I would conclude that there was sufficient evidence for the jury to find an "intentional disregard of the rights of the plaintiff," Wis. Stat. § 895.85(3), as that phrase is properly understood.

¶110. While the evidence does not indicate that Mr. Hogner was an acquaintance of Mr. Strenke at the time of the accident, the evidence nonetheless satisfies the requirement that the wrongdoer's conduct be directed at "the party seeking to recover punitive damages." Wis. Stat.

§ 895.85(1)(c). Mr. Hogner was aware of Mr. Strenke's vehicle when he made his left-hand turn. He testified that he believed Mr. Strenke's vehicle was signaling a right-hand turn. A reasonable jury could conclude that by electing to turn in front of an oncoming vehicle while heavily intoxicated, Mr. Hogner's conduct was directed at the driver of the oncoming vehicle, Mr. Strenke. In other words, a jury could conclude that Mr. Hogner was aware that injury to the driver of the oncoming vehicle was substantially certain to result from his actions.

¶111. Therefore, I concur in the mandate of the majority opinion but do not join in its reasoning.

APPENDIX D

Court of Appeals of Wisconsin.
LeRoy M. STRENKE and Juanita M. Strenke, Plaintiffs-Respondents-Cross-Appellants,

v.

Levi HOGNER and NAU Country Insurance Company, Defendants-Appellants-Cross-Respondents,

American Family Mutual Insurance Company, Defendant.

No. 03-2527.

May 18, 2004.

Certification by Wisconsin Court of Appeals.

Before CANE, C.J., HOOVER, P.J., and PETERSON, J.

*1 Pursuant to Wis. Stat. Rule 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court to determine the following issues:

1. What proof is required for a plaintiff to recover punitive damages under the phrase "in an intentional disregard of the rights of the plaintiff" as provided in Wis. Stat. § 895.85(3)?[1]

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[1] Wisconsin Stat. § 895.85(3) states:

> The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

a. If *Wischer v. Mitsubishi Heavy Industries America, Inc.*, 2003 WI App 202, ¶ 40, 267 Wis. 2d 638, 673 N.W.2d 303, *review granted,* (Wis. April 20, 2004) (Nos. 01-0724, 01-1031 & 01-2486), is correct, are there sufficient facts from which a jury could conclude Levi Hogner was aware his acts were "practically certain" to cause injury?

2. Must a defendant's conduct giving rise to punitive damages have been directed at the specific plaintiff seeking punitive damages?

3. If there was sufficient evidence to submit a punitive damages question to the jury, is the jury's punitive damage award excessive or a violation of Hogner's due process rights?

4. Are compensatory and punitive damages separate claims, susceptible to bifurcation?

On October 16, 1998, Levi Hogner drove his vehicle while intoxicated and caused an accident that injured LeRoy Strenke. Hogner's blood alcohol content was .269%. He was charged with and pled no contest to operating a motor vehicle while intoxicated, fifth offense. On May 10, 2001, LeRoy and Juanita Strenke sued Hogner for negligence, seeking compensatory and punitive damages. Hogner stipulated to liability, but disputed the Strenkes' damages.

The trial court granted Hogner's motion to bifurcate the punitive damages claim from the compensatory damages claim. The jury later awarded the Strenkes $2,000 in compensatory damages.

As to the punitive damages claim, Hogner admitted he had four OWI convictions prior to this incident, but indicated he never injured anyone in any of those previous cases. Hogner further admitted he consumed sixteen to eighteen twelve-ounce containers of beers within a five-hour span that night,[2] but denied he intended to injure anyone.

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[2] Hogner, a male, weighed 400 pounds at the time of the incident.

At the close of testimony, Hogner moved for a directed verdict, arguing the Strenkes did not present a prima facie case that Hogner acted maliciously toward LeRoy or intentionally disregarded LeRoy's rights. The court denied the motion, concluding that while Hogner did not act maliciously toward LeRoy, a jury could conclude Hogner intentionally disregarded LeRoy's rights. The court determined LeRoy was a member of a class of motorists that had rights. It concluded a jury could find Hogner's intentional acts of drinking sixteen to eighteen twelve-ounce containers of beer and then driving while intoxicated, coupled with the fact that he had four prior OWI convictions, created a practical certainty that LeRoy's rights would be disregarded. In closing arguments, the Strenkes asked for $25,000 in punitive damages, but the jury awarded $225,000.

On appeal, the Strenkes concede they are not claiming punitive damages on the ground the Hogner acted maliciously toward LeRoy. Thus, the inquiry is limited to whether Hogner intentionally disregarded LeRoy's rights.

I. "INTENTIONAL DISREGARD OF THE RIGHTS OF THE PLAINTIFF"

*2 In *Wischer*, 267 Wis. 2d 638, ¶ ¶ 40-41, we rejected the notion that a mere volitional act was sufficient to constitute an "intentional disregard" of the plaintiff's rights. Relying on a committee note accompanying WIS JI--CIVIL 1707.1 and on WIS JI--CIVIL 2001, we held that to intentionally disregard the plaintiff's rights unambiguously required the defendant to have (1) a general intent to perform an act, and (2) either (i) a specific intent to cause injury by that act or (ii) knowledge that the act is practically certain to result in injury. *Id.*, ¶ ¶ 39, 40. Relying on *Wischer*, Hogner argues his intentional, volitional acts of drinking a large quantity of alcohol and then driving, regardless of his prior OWI convictions, is not sufficient to prove he intentionally disregarded LeRoy's rights.

As indicated above, the Wisconsin Supreme Court

accepted the petition to review the *Wischer* case. The issue before the court is, "What proof is required for a plaintiff to recover punitive damages under the phrase 'in an intentional disregard of the rights of the plaintiff' as provided in [Wis. Stat. § 895.85(3)]." *Available at* Wisconsin Supreme Court Table of Pending Cases *http://www.wicourts.gov/html/sc/SCCASES.htm* (last modified May 13, 2004). This same issue is implicated here. However, in this case, as opposed to *Wischer*, the underlying circumstances involve a criminal act, specifically operating a motor vehicle while intoxicated, fifth offense; an act that under the common law "outrageous" standard for punitive damages could support a punitive damages award if it was a cause of an accident. *See Lievrouw v. Roth,* 157 Wis. 2d 332, 347, 459 N.W.2d 850 (Ct.App.1990).

Assuming *Wischer* correctly interpreted Wis. Stat. § 895.85(3), the issue then becomes whether the facts of this case satisfy the requirement of "knowledge that the act is practically certain to result in injury." *Wischer*, 267 Wis. 2d 638, ¶ 40. As to "practical certainty," in *Boomsma v. Star Transport, Inc .*, 202 F.Supp.2d 869, 881 (E.D.Wis.2002), the Eastern District of Wisconsin construed Wis. Stat. § 895.85 and concluded a practical certainty is something approaching the inevitable. If *Boomsma's* interpretation correctly states the law, is it approaching the inevitable that a person with four previous OWI convictions, none of which caused injury to anyone, who drives with a .269% blood alcohol concentration, will cause injury? As to the "knowledge" requirement, the district court in *Boomsma* concluded, "A jury may not consider whether the defendant 'ought to have been aware' of the potential for a certain outcome." *Id.* Is *Boomsma* correct that the statute requires actual, subjective awareness of the practical certainty? Supposing *Boomsma's* interpretation is proper, can knowledge be imputed to Hogner as a matter of law on account of his prior OWI convictions and high BAC on the night of the accident?

II. THE DEFENDANT'S CONDUCT AND THE SPECIFIC PLAINTIFF SEEKING PUNITIVE DAMAGES

***3** Also as opposed to *Wischer,* this case squarely presents the supreme court with the opportunity to determine whether a defendant's conduct giving rise to punitive damages must have been directed specifically at the plaintiff. As noted above, Wis. Stat . § 895.85(3) states: The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward *the* plaintiff or in an intentional disregard of the rights of *the* plaintiff. (Emphasis added.)

In addition to the statute focusing on "the" plaintiff, "plaintiff" is specifically defined as "*the party* seeking to recover punitive damages." Wis. Stat. § 895.85(1)(c) (emphasis added). The district court in *Boomsma,* 202 F.Supp.2d at 881, concluded, "the thing which must be practically certain is not harm in the abstract, or even harm to a certain class of people (e.g., other drivers on the road), but harm to the plaintiff."

We question the soundness of the conclusion that the defendant's conduct must knowingly be targeted at the particular plaintiff who eventually seeks punitive damages. In many situations, this literal interpretation of Wis. Stat. § 895.85(3) would manifestly defeat the purpose of punitive damages: to punish the wrongdoer and to deter similar conduct in the future. *See Trinity Ev. Luth. Church v. Tower Ins. Co.,* 2003 WI 46, ¶ 50, 261 Wis. 2d 333, 661 N.W.2d 789. Consider where a drug manufacturer publicly distributes a drug it knows is practically certain to cause harm. Even though the class of people who use the drugs are harmed and that the manufacturer knew this was practically certain to occur, the drug manufacturer could simply use the plain language of § 895.85(3)--language *Wischer* concluded was unambiguous--to preclude liability, arguing that it did not intend or know there was a practical certainty that *those particular plaintiffs* who are seeking to recover punitive damages would be harmed. Also, consider where a person

fires a gun into a crowd of people and injures a stranger. How could the person have awareness that it is practically certain he or she would cause injury to someone he or she never knew?

III. EXCESSIVE OR UNCONSTITUTIONAL PUNITIVE DAMAGE AWARD

If there was sufficient evidence to submit a punitive damages question to the jury, the next issue is whether the punitive damage award is either excessive or unconstitutional. As to the excessiveness ground, Hogner argues: (1) there was no rational relationship between the compensatory damages award of $2,000 and the punitive damage award of $225,000; (2) the ratio of the punitive damages to civil or criminal penalties that could be imposed for comparable misconduct (imprisonment for not less than six months nor more than five years and a fine of not less than $600 nor more than $2,000) is unreasonable;[3] (3) the punitive damages award is excessive in light of his financial condition; (4) and because the Strenkes asked for $25,000 in punitive damages but then received $225,000, the award was based upon passion and prejudice. *See Apex Elec. Corp. v. Gee*, 217 Wis. 2d 378, 390, 577 N.W.2d 23 (Ct.App.1998).

*4 As to the constitutional ground, Hogner argues the punitive damages award violates his due process rights. *See id.* at 389. "[T]he due process clause of the Fourteenth Amendment imposes substantive limits on the size of punitive damage awards." *Id.* Due process is violated "if a punitive damage award inflicts a penalty or burden on a tortfeasor that is disproportionate to the wrongdoing or exceeds what is necessary to serve the purposes of punitive damages." *Id.* at 389-90. Courts consider three factors when determining whether punitive damages violate due process:

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[3] These penalties are taken from Wis. Stat. § 346.65(2)(e) (1997-98), the operative statute at the time the underlying accident in this case occurred.

(1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between this remedy and the civil or criminal penalties authorized or imposed in comparable cases. *Jacque v. Steenberg Homes, Inc.*, 209 Wis. 2d 605, 627, 563 N.W .2d 154 (1997).

In view of these factors, Hogner argues the award of $225,000 was substantially more than necessary to serve the penalizing and deterring purposes of punitive damages. On the other hand, as the Strenkes point out, past jail terms and fines were insufficient penalties to deter Hogner from operating a motor vehicle under the influence for a fifth time.

IV. BIFURCATING COMPENSATORY DAMAGES FROM PUNITIVE DAMAGES

The final issue involves the Strenkes' cross-appeal: whether the trial court erred by bifurcating the compensatory damages from the punitive damages matter. Claims, not issues, can be bifurcated provided they are tried before the same jury. *Waters v. Pertzborn*, 2001 WI 62, ¶ 35, 243 Wis. 2d 703, 627 N.W.2d 497. Here, there is no problem with "the same jury" requirement or the same five-sixths requirement. The crux of this issue is whether compensatory and punitive damages are indeed separate claims that can be bifurcated. The Strenkes contend they are not because they arise from the same factual background, as compared to, say, a underinsured motorist claim and bad faith claim. *See Dahmen v. American Fam. Mut. Ins. Co.*, 2001 WI App 198, ¶ 20, 247 Wis. 2d 541, 635 N.W.2d 1 (underinsured claim and bad faith claim can be bifurcated). Hogner, on the other hand, stresses the different natures of compensatory and punitive damages and the different burdens of proof. While compensatory damages focus on the Strenkes' loss, punitive damages focus on Hogner's conduct. Moreover, compensatory damages must be proved by a preponderance of the evidence, while punitive damages must be established by clear and convincing evidence.

If compensatory and punitive damages are separate claims, the attendant issue of whether the trial court erroneously exercised its discretion by bifurcating the claims arises. *See id.* at 548 (bifurcation left to trial court's discretion). The trial court "must consider the potential prejudice to the parties, the complexity of the issues, the potential for jury confusion and the issues of convenience, economy and delay." *Id.*

***5** Whether the court of appeals and federal district court have correctly stated the law on Wisconsin's punitive damages statute is a matter of substantial importance. This case, along with the *Wischer* case, gives the supreme court ample opportunity to address Wisconsin's law on punitive damages. Further, it would be appropriate for the supreme court to determine whether bifurcation of compensatory and punitive damages is permitted.

Not Reported in N.W.2d, 2004 WL 1097753 (Wis.App.)

APPENDIX E

STATE OF WISCONSIN CIRCUIT COURT BARRON COUNTY

LEROY M. STRENKE
JUANITA M. STRENKE
414 235TH AVENUE
CUMBERLAND, WI 54829

PLAINTIFF,

VS.

LEVI HOGNER
2595 2ND STREET #189
CUMBERLAND, WI 54829

NAU COUNTRY INSURANCE COMPANY
6701 HIGHWAY 10 NW
RAMSEY, MN 55303

AMERICAN FAMILY MUTUAL INSURANCE COMPANY
6000 AMERICAN PARKWAY
MADISON, WI 53783

BLUE CROSS & BLUE SHIELD UNITED OF ALABAMA
450 RIVERCHASE PARKWAY EAST
BIRMINGHAM, AL 55298

DEFENDANTS.

PERSONAL INJURY - AUTO - 30101

FILED

AUG 13 2003

Circuit Court, Barron Co., WI

JUDITH WELLS ESPESETH, CLERK

ORDER FOR ENTRY OF JUDGMENT AND JUDGMENT ON THE VERDICT

CASE NO: 01 CV 179

Upon the verdict rendered at trial in this matter on May 9, 2003, and upon the order of this Court on motions after verdict heard on July 7, 2003,

IT IS HEREBY ORDERED THAT:

1. The Clerk may enter judgment in favor of LeRoy Strenke and against Levi Hogner and NAU Country Insurance Company in the amount of $2,000.00 in accordance with the Special Verdict regarding compensatory damages dated May 9, 2003;

2. The Clerk may enter judgment in favor of LeRoy and Juanita Strenke and against Levi Hogner for punitive damages in the amount of $225,000.00 in accordance with the Special Verdict regarding punitive damages dated May 9, 2003.

Dated this 12 day of August, 2003.

s/HONORABLE FREDERICK A. HENDERSON

JUDGMENTS

These judgments, pursuant to the above Order, are in the amount of $2,000.00 in favor of LeRoy Strenke and against Levi Hogner and NAU Insurance Company and $225,000.00 in favor of LeRoy and Juanita Strenke against Levi Hogner.

Dated this 12 day of August, 2003.

s/HONORABLE FREDERICK A. HENDERSON

(2)

No. 05-1026

Supreme Court, U.S.
FILED
MAY 18 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LEVI HOGNER,

Petitioner,

v.

LEROY M. STRENKE and
JUANITA M. STRENKE,

Respondents.

On Petition For *Writ Of Certiorari*
To The State Of Wisconsin
Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents object to Petitioner's statement of the question presented on the grounds that it is argumentative. The question presented for review, more properly stated, is:

Whether the Wisconsin Court of Appeals properly determined that the punitive damage award of $225,000 did not violate the protections afforded by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

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STATEMENT ON JURISDICTION

This court is without jurisdiction pursuant to 28 U.S.C. §1257 as to petitioner's argument that the Wisconsin Court of Appeals improperly considered the potential harm that might be caused by petitioner's conduct, because (1) petitioner's counsel made no objection to the trial court's jury instruction which included that item as a factor for the jury to consider in determining punitive damages and (2) petitioner never contended in the Wisconsin Court of Appeals that potential harm was improperly considered.

Moreover, this court is also without jurisdiction pursuant to 28 U.S.C. §1257, because the petitioner's request for Supreme Court review is based solely on the claim that the Wisconsin Court of Appeals failed to apply what is established law, and, hence, petitioner's request fails to set forth an important question of federal law.

STATEMENT OF THE CASE

In concluding that the punitive damage award did not violate Hogner's due process rights, the Wisconsin Court of Appeals, contrary to the petitioner's statement of the case, did not "flatly dismiss" any command of *State Farm Mutual Auto Insurance Company v. Campbell*, 538 U.S. 408 (2003), that punitive damages should almost never exceed a single-digit multiple of actual damages. In reaching its decision that the jury's punitive damage award was not excessive and therefore did not violate the Due Process clause, the Wisconsin Court of Appeals thoroughly analyzed and applied the Supreme Court's statements in *State Farm*.

Petitioner also fails to include certain material facts in his statement of the case:

First, not only was petitioner severely intoxicated at the time of the accident in question, but he had been arrested and convicted for drunken driving on four occasions prior to the one in question. (App., p. 2a-3a, 7a-8a)

Second, although petitioner claims before this court that the Wisconsin Court of Appeals improperly considered the potential harm that could be caused by his conduct, the record shows petitioner's counsel made no objection to the trial court's instruction to the jury that the factors it was to consider in determining punitive damages under Wisconsin law included that "potential damage which might have been done by such acts as well as the actual damage." (App., p. 13a-27a) Likewise, although petitioner did raise the issue of the constitutionality of the punitive damage award in the Wisconsin Court of Appeals, that challenge was never based on an improper consideration of the potential harm that could be caused by his reprehensible conduct.

Third, the jury in this case heard all the evidence about the defendant's financial circumstances and the instruction as to the factors it was to consider in determining punitive damages included taking into consideration the defendant's ability to pay. (App., 3a-7a, 27a)

ARGUMENT FOR DENYING THE PETITION

I. The Wisconsin Court of Appeals Did Not Dismiss or Ignore *State Farm's* Comments About a Single-Digit Ratio.

Throughout his petition, Hogner claims that the Wisconsin Court of Appeals "ignored," "dismissed" and "disregarded" this Court's decision in *State Farm*. Nothing could be further from the truth. In the text of its decision in *Strenke v. Hogner*, 2005 WI App 194, 704 N.W.2d 309, the Wisconsin Court of Appeals directly addressed *State Farm*, citing, quoting, analyzing and applying this Court's decision. *Id.* At ¶¶ 14-17, 21, 23-26.

Hogner's petition is based on the premise that *State Farm* established a "single-digit rule." (Petition, p. 6) However, as the Wisconsin Court of Appeals correctly determined, *State Farm* essentially reaffirmed the guideposts set forth by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and neither case established a bright-line "rule" for a single-digit ratio of punitive damages to actual damages. *See Strenke at* ¶ 17 n. 8, ¶ 25.

A simple reading of this Court's decision in *State Farm* concerning ratios destroys Hogner's claim that *State Farm* established a "single-digit rule." The Court reiterated:

> [W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. [Gore,] 517 U.S. at 582.

538 U.S. at 424.

> ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award."); *TXO* [*Production Corp. v. Alliance Resources Corp*, 509 U.S. 443 (1993)], *supra*, at 458.

538 U.S. at 424-25.

> We decline again to impose a bright-line ratio which a punitive damages cannot exceed.

538 U.S. at 425.

> [B]ecause there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those that we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." [*Gore*, 517 U.S. at 582]; see also, [*Gore*, 517 U.S. at 582] (positing that a higher ratio *might* be necessary where "the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine").

538 U.S. at 425.

> The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

538 U.S. at 425.

Thus, this Court in *State Farm* made it clear that it was not establishing a "single-digit rule," upon which Hogner's entire petition is based. The Wisconsin Court of Appeals specifically stated that the majority's statement in *State Farm* about a single-digit ratio is not "as the holding makes clear, a new single-digit rule." 2005 WI App 194,

¶17, n. 8. The Wisconsin Court of Appeals' comment that the majority's remark in *State Farm* concerning single-digit ratios is dicta is not a basis for Supreme Court review, because whether that remark is dicta or not, the Wisconsin Court of Appeals still properly considered and applied *State Farm's* principles and analytical framework concerning proportionality for determining the constitutionality of a punitive damages award.

There is also no support for Hogner's claim that "courts all too routinely have ignored or defied" the decision in *State Farm* or that there is "an increasing number of courts that have disregarded" the holdings in *State Farm* (Petition, p. 5) or that the decision here is part of a "trend." (Petition, p. 20) Hogner merely cites 7 examples of appellate cases where courts have allowed awards with ratios greater than 9:1 and 5 examples of appellate cases where courts have limited awards to ratios below 10:1. (Hogner petition, pp. 10-11, n. 6) There is no showing that these represent all cases addressing *State Farm's* dictates. This does not establish anything other than the fact that courts throughout our 50 states are going about the process of applying this Court's teachings about punitive damages and due process and that, just as those teachings explain, there may be cases in which a greater than single-digit ratio is justified without violating the defendant's due process rights. Each case must be considered on its own facts and not by simply looking at the ratio. Thus, Hogner fails to establish some disturbing trend that requires this Court to do more explaining of its views on proportionality of punitive damages. Certainly this particular case does not call for that.

II. Hogner Has Waived the Right to Question the Consideration of Potential Harm in the Punitive Damage Analysis.

Hogner claims that review is warranted because the Wisconsin courts improperly considered the potential harm that could be caused by his conduct. (Petition, pp. 12-17) However, Hogner waived this argument by failing, (1) before the trial court, to object to the jury instruction which told the jury that among the factors it was to consider in determining punitive damages was that very potential harm (App., pp. 13a-27a) and (2) before the Wisconsin Court of Appeals, to contend that the potential harm that could be caused by his conduct should not be considered.

It is axiomatic that an appellate court, let alone the highest appellate court in the land, will generally not review any argument raised in the court below. *United States v. Bean*, 537 U.S. 71 (2002); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). This Court has specifically held that, when raising a federal question for Supreme Court review, it is essential that the question be raised, presented, and pursued in a timely and proper manner at the appropriate point in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919). In fact, this Court has no jurisdiction to exercise its appellate power over state court judgments under 28 U.S.C. §1257 unless a federal question has been both raised and decided in the state court below. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Thus, Hogner has waived any right to raise this argument.

III. Hogner's Claim that the Wisconsin Court of Appeals Misapplied This Court's Decision in *State Farm* Is Not a Basis for Granting Certiorari.

In *State Farm*, this Court reiterated the importance of a reasoned application of the guideposts in *Gore*. Elaborating on these guideposts this Court highlighted several factors for consideration by courts when engaged in a de novo due process review of punitive damages.

As mentioned above, the Wisconsin Court of Appeals thoroughly applied this Court's decision in *State Farm* in its decision in this case. Petitioner can cite to no language from the *Strenke* decision that truly misstates or contradicts any portion of this court's holding in *State Farm*. Hence, Hogner's petition is based solely on the claim that the Wisconsin Court of Appeals misapplied the law of *State Farm* to the specific facts in this case. Respondents take issue with Hogner's claim that the Wisconsin Court of Appeals misapplied *State Farm*. *See* §IV *infra*. However, even if Hogner were correct in his characterization of the Wisconsin Court of Appeals' decision, his petition fails to set forth a basis for Supreme Court review.

This Court has typically limited discretionary review of decisions coming out of the state courts to only those cases that involve important constitutional questions. *Zucht v. King*, 260 U.S. 174, 176 (1922). In fact Rule 10 of the Rules of the Supreme Court of the United States, which sets forth the appropriate reasons for granting a writ of certiorari, has specifically incorporated the requirement that the case involve an "important federal question." Sup. Ct. R. 10.

It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of error in lower court decisions. The Court's role, rather, is to determine questions of constitutional importance. It is then the role of the lower courts to apply these principles to the great mass of cases. The responsibility of this Court has been characterized as too great to require it to correct every perceived error by lower courts in the application of accepted principles. Robert L. Stern Et Al., Supreme Court Practice §4.17 (7th Ed. 1993). As Justice Rehnquist observed in *Ross v. Moffitt,* 417 U.S. 600, 616 (1974). "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." The court's aversion to error correction has been codified in this Court's Rule 10:

> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10.

Hogner's petition asks for nothing more than error correction based on the alleged misapplication of the established law, i.e., *State Farm,* by the Wisconsin Court of Appeals. As such, Hogner's petition does not involve a substantial federal question but rather a question of importance merely to the litigants in the pending action. This Court has adopted a practice of limiting the acceptance of appeals to only those cases that involve the settlement of issues that are of importance to the public, as opposed merely to the parties. *Rice v. Souix City Memorial Park Cemetary,* 349 U.S. 70 (1954). Hogner provides this Court with no reason to deviate from this accepted practice.

Unable to identify a substantial federal question, Hogner suggests that granting the writ would allow this Court to "resolve any gap in this Court's punitive damages jurisprudence." (Petition, p. 4) However, no gap in jurisprudence is demonstrated by Hogner; the only gap is between the Wisconsin Court of Appeals' conclusion and Hogner's desired conclusion.

IV. Applying the Principles in *State Farm*, the Wisconsin Court of Appeals Correctly Determined that the Jury's Punitive Damages Verdict Did Not Violate Hogner's Due Process Rights.

A punitive damage award that is the product of a fair process is entitled to a strong presumption of validity. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993). Hogner points to nothing unfair about the trial. No evidentiary rulings are challenged. The compensatory damages phase yielded only a modest damages award, demonstrating that the jury gave careful consideration to each side's evidence and arguments.

A state may, consistent with the Constitution, further its goals of punishment and deterrence through the imposition of punitive damages. *BMW*, 517 U.S. at 568; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

Wisconsin courts have recognized the important role that punitive damages play in serving the interests of punishing and deterring drunk driving. As the court observed in *Lievrouw v. Roth*, 157 Wis.2d 332, 345, 459 N.W.2d 850 (Ct.App. 1990), "[d]runk driving is a terrible scourge," and "[i]ntentionally driving while alcohol-impaired is the type of outrageous conduct that punitive

damages should punish and deter." *Id.* Thus, Hogner cannot argue that drunk driving is unworthy of punishment and deterrence, or that recidivist drunk driving is undeserving of added sanctions.

Due process requires that a person receive fair notice of the conduct that will subject him to punishment and the severity of the penalty that a state may impose. *BMW*, 517 U.S. at 574. Hogner cannot argue that he lacked notice that his drunk driving could subject him to a punitive damage award. *Lievrouw* made clear that drunken driving "will support an award of punitive damages in an appropriate case." 157 Wis.2d at 348. If there ever were an appropriate case, this is one.

As for the size of the award, only when it is grossly excessive in relation to the legitimate state interests in punishment and deterrence does it violate due process. *BMW*, 517 U.S. at 568. In *BMW*, 517 U.S. at 575, the court described three guideposts to determine whether a defendant had adequate notice of the size of the possible sanction: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered and the punitive damage award; and (3) the difference between the award and the civil penalties authorized or imposed in comparable circumstances.

In *State Farm*, the court enunciated five sub-factors for determining the degree of reprehensibility: (1) whether "the harm caused was physical as opposed to economic"; (2) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) whether "the target of the conduct had financial vulnerability"; (4) whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether "the

harm was the result of intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419; *BMW*, 517 U.S. at 576-77.

A consideration of these factors demonstrates that the punitive damages award here was not excessive.

A. Hogner's Conduct Was Reprehensible

The most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct. *State Farm*, 538 U.S. at 419; *BMW*, 517 U.S. at 575. The reprehensibility of Hogner's conduct is beyond dispute. This was not a close case, where a driver can plausibly claim that he lacked knowledge that he was impaired. Hogner here drank himself into an extremely dangerous level of inebriation and impairment. His blood alcohol level by weight tested at .269. As he left the tavern, he got behind the wheel of his car intending to drive to another tavern, presumably to drink more. He had a passenger in his car. Thus, he deliberately endangered his own passenger, and all other users of Wisconsin's roadways, including Mr. Strenke.

Hogner had been convicted four times before for drunk driving and knew the legal implications. The evidence was sufficient and compelled a finding that Hogner had engaged in a pattern of drunk driving and endangerment of the public with whom he shared the roads.

The aggravating factors discussed in *BMW*, 517 U.S. at 576-80, are present here. First, Hogner's conduct evinced an intentional disregard for the safety of the other users of the public highways, and this led to the most serious form of harm – personal injury. Second, Hogner's

acts were affirmative acts of misconduct, not merely acts of misfeasance. Third, Hogner's conduct was part of a pattern of conduct that reflected an intentional disregard for the public's rights to safety and bodily security. As noted in *BMW*, 517 U.S. at 576-77, repeated misconduct is more reprehensible, more deserving of severe punishment, and more in need of deterrence than an individual instance of misconduct. Given the strength of the evidence of reprehensibility, held to be the most important of the factors, the punitive damage award does not shock the conscience, as the trial court ruled.

B. The Wisconsin Court Properly Evaluated the Proportionality of the Punitive Damages Award, Including Considering the Potential Harm or Damages.

Another indicium of excessiveness is the comparison of the punitive damage award to the actual or potential harm or damages. Although this is only one guidepost, Hogner reads *State Farm* as establishing a mathematical limitation on the size of a punitive damage award as a matter of due process. But *State Farm*'s actual language says, at 1524:

> Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. . . . We decline once again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, ***few*** awards exceeding a single-digit ratio between punitive and

> compensatory damages, ***to a significant degree***, will satisfy due process.

(emphasis added)

Despite the court's specific disavowal of any bright-line rule, Hogner's petition cites this passage as erecting a "single-digit rule." (Petition p. 6) Judge Posner, writing for the Seventh Circuit in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003), explained that "[t]he supreme court [in *State Farm*] did not, however, lay down a 4-to-1 or single-digit-ratio rule – it said merely that 'there is a presumption against an award that has a 125-to-1 ratio'." In *Mathias*, the court upheld an award of punitive damages that was 37.2 times the compensatory damages awarded by the jury.

State Farm explained that "ratios greater than those *we have previously upheld* may comport with due process" where "a particularly egregious act has resulted in only a small amount of economic damages" or where "'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" 538 U.S. at 425 (emphasis added). Thus, to fully understand *State Farm* it is necessary to examine the ratios the Court has "previously upheld." Among these is *TXO*, 509 U.S. 443.[1] *TXO* was the most recent opinion in which the Supreme Court had "previously upheld" a punitive damage award, and it included an extensive concurring opinion by Justice Kennedy, the author of *State Farm*, in which he states

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[1] *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (4:1 ratio between punitive and compensatory damages, and 200:1 ratio between punitive damages and plaintiff's "hard" out-of-pocket expenses); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (punitive to compensatory damages ratio over 100:1).

unequivocally that the award, which resulted in a punitive to compensatory ratio of 526 to 1, was constitutionally appropriate. *TXO* was cited with approval in *State Farm*. 538 U.S. at 416, 423-25.

In *TXO*, a West Virginia jury determined that the defendant TXO, a large oil company, intentionally sought to cloud the plaintiff's title to oil and gas rights which TXO desired to purchase. TXO's actions were found to be malicious and part of a broad practice of fraud and trickery. The award of $10 million punitive damages, compared to the award of $19,000 in compensatory damages, a ratio of 526 to 1, was specifically approved by the Supreme Court as not constitutionally excessive.

The *TXO* court found that "[w]hile petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents had petitioner succeeded in its illicit scheme." Assuming that the potential loss could be $1 million, the court stated that "the disparity between the punitive award and the potential harm (i.e. 10 to 1) does not, in our view, 'jar one's constitutional sensibilities'" *TXO*, 509 U.S. at 462 (citation omitted)

Justice Kennedy, however, refused to rely on the 10 to 1 ratio and specifically approved the ratio of 526 to 1. In his concurring opinion, he wrote,

> The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions . . . I do not agree that [the punitive to compensatory ratio relied

> upon by the majority] provides a constitutionally adequate foundation for concluding that the punitive damage verdict against *TXO* was rational.

Id. at 467-68.

Justice Kennedy found the award appropriate because TXO acted with malice as part of a pattern of practice of fraud, trickery and deceit. Further, he specifically endorsed the evidence of other instances of similar malfeasance, the evidence of TXO's "vast financial resources," and the fact that "TXO would suffer only as a result of a large judgment." *Id.* at 469.

The Supreme Court's clear approval in *State Farm* of its *TXO* opinion is significant. There was no evidence in *TXO* to suggest that the court considered the defendant's conduct to have satisfied *any* of the first three sub-factors (no personal injury, no health and safety issues, and no financial vulnerability). The harm was purely economic harm done by one corporation to another and thus factors (1) and (2) could not possibly have been accomplished, and the court made no reference to the financial vulnerability of the plaintiff.

Thus, under the Supreme Court's own guidelines, conduct which is not at the top of the scale for reprehensible conduct warranted a ratio of punitive to actual damages of at 526 to 1, where the potential harm was great. Given the Court's clear approval in *State Farm* of its "previously upheld" awards, one can only conclude that awards in excess of 10 to 1 are perfectly appropriate for those cases where at least some, if not all, of the reprehensibility sub-factors are present, and particularly where the last two sub-factors exist. Indeed, given the Court's continued emphasis on a defendant's pattern and practice and

the need for strong medicine where recidivist behavior is present, it is apparent that the fourth and fifth sub-factors (4) repeated actions, and (5) malice, trickery or deceit are the most significant in assessing the amount of a punitive damages award.

Recognizing that the Supreme Court meant to label as suspect only those awards that exceed a single-digit ratio by a "significant degree" is also consistent with its oft-stated holding, confirmed again in *State Farm,* that it refuses to set a bright-line test for a punitive to compensatory ratio. Instead, the Court holds, in essence, that a punitive award should be closer to a single-digit ratio than ratios such as 145:1 or 500:1, depending on the circumstances of the particular case. This is not the bright-line test or "single-digit rule" that Hogner urges.

The U.S. Supreme Court has rejected the notion that the constitutional line is marked by a simple mathematical formula and, instead, has favored a general inquiry into reasonableness. *BMW*, 517 U.S. at 582-83. This is understandable since it is not possible to capture in one ratio all of the qualitative factors involved in determining the appropriate level of punishment. "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 123 S.Ct. at 1524.

Hogner's argument thus starts from the flawed premise that there is a fixed constitutional ratio. Beyond that flawed assumption, however, Hogner's argument ignores that the proportionality of the punitive damage award is measured not solely in comparison to the actual award of compensatory damages, but also in comparison to the *potential* harm caused to the victim and others. This

Court has always recognized the potential harm which could be caused by the defendant's conduct as a valid factor to be considered in looking at the constitutionality of a punitive damages award. *BMW*, 517 U.S. at 575, 581-82; *TXO*, 509 U.S. at 460.

In *TXO* the Court stated:

> It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim . . . as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.

509 U.S. at 460. The Court then explicitly considered the potential that defendant's conduct could have caused $1,000,000 in compensatory damages, rather than the $19,000 awarded by the jury, in determining how to address the proportionality of the punitive damages. 509 U.S. at 458-62. In *State Farm*, this Court cited *TXO* with approval on this point. 538 U.S. at 424-25. The Wisconsin Court of Appeals recognized that "*TXO* is still good law," *Strenke*, 2005 WI App at ¶24, n. 13, and then examined the potential harm that a recidivist drunk driver like Hogner could cause. The court concluded that absent Hogner's "good luck," his conduct could have easily resulted in compensatory damages that would have put the punitive damages award in the 1:1 or 2:1 range. 2005 WI App at ¶24, n. 14. This is the same valid consideration and analysis as that done by this Court in *TXO*.

Hogner's conduct was particularly egregious and the actual harm it caused was substantial, even though the award was only $2,000. Even so, the jury's compensatory damage award is not the only figure to use in any ratio

because it does not reflect the potential harm attributable to Hogner's drunk driving. Strenke could have been hurt much worse or killed. There could have been other passengers in the Strenke car. Hogner had a passenger who could have likewise been injured or killed. Multiple vehicles could have become involved if they had been in the area when the collision occurred. It is fortuitous that the consequences were not disastrous.

Thus the potential harm in this case is far more significant than the modest amount of harm that resulted through happenstance. The difficulty in measuring in financial terms the value of personal physical injuries and the potential for catastrophe when a drunk driver gets behind the wheel demonstrates the need for a higher ratio, a circumstance recognized in *State Farm* ("a higher ratio *might* be necessary where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" 123 S. Ct. at 1524, *quoting Gore* [emphasis in the original]).

The jury, the trial court, and the Wisconsin Court of Appeals were entitled to consider the potential harm that could result if similar future behavior by Hogner is not deterred by a heavy punitive damage sanction. Hogner will presumably have the opportunity – whether licensed or not – to get behind the wheel again. If he were to engage in this reprehensible conduct again, he could cause deaths or serious injuries. This large punitive damage award serves the deterrent purpose of making Hogner, and others in his community, think twice before drinking and driving. Thus, while Hogner stresses the disparity between the punitive damage award and the jury's award of compensatory damages, that disparity vanishes when one considers the potential harm. Consideration of the second

BMW guidepost therefore does not support a conclusion that the punitive damage award is excessive.

Thus, the consideration of potential harm or damages is not some "vague notion" as described by Hogner. (Petition, p. 12) Hogner points to no conflict in the federal circuits or state courts regarding the concept of considering potential harm in the punitive damage analysis that would justify Supreme Court review. The Wisconsin Court of Appeals did nothing more than apply well known guidelines of the United States Supreme Court in determining that Hogner's right to due process had not been violated.

C. Petitioner's Financial Condition Was Properly Considered by the Jury and the Wisconsin Court of Appeals.

Hogner also attacks the punitive damage award because it is beyond his current net worth. This argument is without merit. No Supreme Court case states that the ratio of a defendant's net worth to the punitive damage award is a constitutional factor or that a punitive damage award that exceeds a defendant's net worth is unconstitutional as a matter of law. Hogner's due process rights were not violated because his conduct justified punishment in excess of his worth. Also, Hogner's argument about financial condition introduces a complexity to Hogner's ratio argument that has not been confronted in any prior cases. There is no prior case where ability to pay has been somehow engrafted into the constitutional analysis of the proportionality of a punitive damage award. There is no substantial federal question where the Wisconsin Court of Appeals decision does not conflict with any prior decisions of this court or any other court relative to the matter of

defendant's wealth. Thus, this issue does not justify Supreme Court review.

That the judgment against Hogner for punitive damages may impose a substantial burden on him for the foreseeable future is an appropriate deterrent message to him and to others. It is not inappropriate that he live under the burden of this judgment for a considerable period, so that it might influence his future choices when those choices potentially affect the health and safety of others.

Also, the defendant's lack of wealth is often within his or her control. A defendant can choose to earn less or spend more thereby depressing his or her net worth. If Hogner had been unemployed, without any earnings, he would be claiming that no award of punitive damages is constitutionally justified, because it would exceed his worth. Likewise, there is nothing to say that Hogner could not, in order to pay off his punitive damages obligation in the future, work to improve his financial position, by for example obtaining better paying employment and saving on expenses. To draw any kind of constitutional line for punitive damages awards at the level of a defendant's net worth could wipe out the deterrent effect, in which a state has a legitimate interest. An otherwise constitutionally valid punitive damage award that exceeds a defendant's net worth no more violates due process rights than does a compensatory damage award that exceeds the defendant's insurance and net worth.

It is also worth noting that "wealth" in this context includes the comparative resources that an insured driver can bring to bear in the defense of an accident case like this one where only modest compensatory damages are at

stake. *See Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677-78 (7th Cir. 2003). The public should not have to await a multiple-death catastrophe or one where the victim requires years of expensive life support, to impose a heavy dose of punitive damages on those who feel unconstrained to drink and drive. Punitive damages should be available when the misconduct involved is highly dangerous, even though only modest compensatory damages are awarded, so as to encourage victims and their attorneys to seek justice in the courts and thereby deter such misconduct and save lives.

Finally, the record shows that the Wisconsin courts did not ignore the evidence concerning Hogner's wealth. The jury heard the evidence of Hogner's ability to pay, (App., 4a-7a) consistent with Wisconsin law which makes such a proper factor for the jury and court to consider. The trial court instructed the jury via Wis Jury Instruction – Civil 1707.1 that the defendant's ability to pay is a factor they were to consider in awarding punitive damages. (App., 27a) The Wisconsin Court of Appeals also considered Hogner's "conclusory" argument that the award was excessive because of his financial condition, noting that this was an appropriate factor for the jury to consider and that it could not, on constitutional grounds, say that an award "that cannot be immediately satisfied is always, as a matter of law, constitutionally insupportable." *Strenke*, 2005 WI App at ¶27, n. 17.

CONCLUSION

Nothing in the Wisconsin Court of Appeals' decision in *Strenke* in any way contradicts this Court's holding in *State Farm*. At best, Hogner's petition requests review solely based on the Wisconsin Court of Appeals' alleged misapplication of established law. This Court is not a court of error correction. Hogner waived the right to question the consideration of potential harm by failing to object to that factor in the jury instructions and by failing to argue in the appellate court below that it should not be considered. Because Hogner has failed to present a significant federal question requiring Supreme Court Review, his petition should be denied.

In addition, there is no basis for Hogner's claim that the Wisconsin Court of Appeals misapplied the law. In *Strenke* the Wisconsin Court of Appeals correctly determined that the jury's punitive damage verdict comports with due process pursuant to this Court's prior decisions. Having little chance of success on the merits, Hogner has failed to establish a sufficient basis for Supreme Court review.

Respectfully submitted,

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May 15, 2006

APPENDIX A

CIRCUIT COURT

STATE OF WISCONSIN BARRON COUNTY

LE ROY M. STRENKE and
JUANITA M. STRENKE,

Plaintiffs,

vs.

LEVI HOGNER, NAU COUNTRY INSURANCE COMPANY, AMERICAN FAMILY MUTUAL INSURANCE COMPANY and BLUE CROSS AND BLUE SHIELD UNITED OF ALABAMA,

Defendants.

PARTIAL TRANSCRIPT OF JURY TRIAL

01-CV-179

Partial transcript of testimony given and proceedings had at the jury trial held in the above-entitled matter before HON. FREDERICK A. HENDERSON, Acting Circuit Judge, at the Courthouse in the City of Barron, Barron County, Wisconsin, on the 7th, 8th and 9th days of May, 2003.

APPEARANCES:

Mr. Owen R. Williams, Attorney at Law, appearing on behalf of the Plaintiff;

Ms. Karen Kingsley, Attorney at Law, appearing on behalf of the defendant;

Plaintiffs, LeRoy and Juanita Strenke, present in person; Defendant, Levi Hogner, present in person.

* * *

[2] THE COURT: All right. Now we go into the second phase of the trial so take over, Mr. Williams. Tell the jury what this is all about. Mr. Ament is now gone. He's not involved. Go ahead.

MR. WILLIAMS: I believe we are going to present this phase of the trial to the Court and the jury by stipulation. I'm addressing this remark to the Court because we have not discussed this, but what we are going to present to you is a stipulation that at the time that this accident occurred Levi Hogner was under the influence of alcohol and it was his 5th offense and that his alcohol content was .267 and I will then rest my case when the Court approves that stipulation, if the Court does approve it.

MS. KINGSLEY: I did want to briefly call Mr. Hogner.

THE COURT: Ms. Kingsley will present her client to testify about the operation of the vehicle at the time and what he has to say about that. Am I correct, Ms. Kingsley?

MS. KINGSLEY: Correct.

THE COURT: All right. Is that the stipulation as you understand it, Ms. Kingsley?

MS. KINGSLEY: That's fine.

THE COURT: We'll receive that stipulation into evidence and advise the jury that you're bound by that [3] stipulation. Okay.

MR. WILLIAMS: I made a mistake. I think it's .269, not .267.

THE COURT: We'll mark that as an exhibit. .269 is the alcohol content and that's by weight of alcohol in the blood as opposed to the volume. Go ahead. *LEVI HOGNER*, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. KINGSLEY:

Q. Mr. Hogner, I want to ask you about the incident. You admit that you were driving at the time of the incident prior to the accident?

A. Yes.

Q. Can you just kind of tell me in your own words what happened in the accident?

A. I remember coming from the bar, Dale's Twin Pines. We were going downtown Cumberland. and I was driving southbound. I was going to turn east, I believe, on 23rd. I seen cars coming. I believe I seen his blinker on as he was going to turn into the same street so I believe –

Q. Would that have been his right or –

A. His right.

Q. And what did you do?

A. I was believing I could turn before he did.

Q. And what happened?

[4] A. When I turned I got hit in the back.

Q. Okay.

A. Rear, right rear.

Q. Okay. And as a result of that did you plead to something?

A. Yes.

Q. And did you serve some time?

A. Yes, I did.

Q. How much time did you serve?

A. One year County Jail.

Q. Are you still on probation?

A. Yes.

Q. Okay. Part of this claim is for punitive damages so I need to ask you a little bit about your finances, what money you have and that type of thing, okay? Do you work?

A. Yes.

Q. Where do you work?

A. St. Croix Casino hotel.

Q. And what do you do there?

A. I'm a black jack dealer.

Q. How long have you done that?

A. For three years now.

Q. How much money do you earn doing that? Can you give me maybe an average month?

A. A thousand dollars a month.

[5] Q. Is that how much you take home or is that before taxes or what?

A. That's probably what I take home.

Q. About a thousand dollars a month? Okay, And do you have any other sources of income?

A. Per capita.

Q. Okay. Is that because you're a member of the Native American community?

A. Yes.

Q. And how much is that?

A. $1,500 a month before taxes.

Q. Okay. So do you know how much that is after?

A. After it's about a thousand dollars.

Q. So your total income for the month is about $2,000?

A. Yes.

Q. Okay. Then do you have any other sources of income?

A. No.

Q. Do you own any land?

A. No.

Q. Do you own any boats?

A. No.

Q. Any other big items that you own?

A. No.

Q. Do you own a car?

A. Well, not yet. I'm paying on a car.

[6] Q. How much are you paying on a car?

A. $226 a month.

Q. How much longer do you have to pay on that?

A. Four years.

Q. Let me ask you about your other living expenses. Do you pay rent?

A. Yes.

Q. How much do you pay?

A. $139 a month.

Q. Give me on average a month how much do you pay? How much you spend for food?

A. About $400 a month.

Q. How about utilities?

A. $30 a month.

Q. Do you support anyone besides yourself?

A. I have a son.

Q. And do you pay child support?

A. Yes, I do.

Q. How much do you pay a month for that?

A. $350 a month.

Q. Do you have any savings?

A. No.

Q. Do you have a checking account?

A. Yes, I do.

Q. How much is in your checking account?

[7] A. $20.

Q. Do you have any other debts we haven't talked about?

A. Yes.

Q. Tell me about any debts you have?

A. I have two for Cumberland Hospital in the amount of around $3,300.

Q. Okay. Any other debts?

A. No.

Q. Okay. Did we cover all your monthly expenses then?

A. Well, I pay the supervision fee for probation which is $40 a month.

MS. KINGSLEY: Okay. I think that's all I have. Thank you.

CROSS EXAMINATION BY MR. WILLIAMS:

Q. Mr. Hogner, were you convicted of drunk driving as a result of an occurrence on February 10th of 1989?

A. Yes, I believe so.

Q. Were you convicted of a drunk driving offense on March 4th of 1990 in Buffalo County?

A. Yes.

Q. Were you convicted of drunk driving on March 25, 1993 in Barron County?

A. Yes.

Q. Were you convicted of drunk driving on May 29, 1994 in Polk County?

[8] A. Yes.

Q. And as a result of this driving were you convicted of drunk driving as a result of driving on October 16, 1998 in Barron County?

A. Yes.

Q. And am I correct that you've been convicted five times of drunk driving?

A. Yes.

Q. And that was a felony offense?

A. No.

Q. Now, where were you drinking before you were involved in this collision on October 16th?

A. Dale's Twin Pine tavern.

Q. And is that on State Trunk Highway 48?

A. Yes, it is.

Q. And how much do you weigh, or how much did you weigh at that time, Mr. Hogner?

A. I'd say 400 pounds.

Q. And how much did you have to drink at that time?

A. Four to six drinks at the bar.

Q. And four to six drinks. Do you know what you tested that time?

A. No.

Q. Let me show you what's been marked by the clerk as Exhibit 38. Is that you, Levi Hogner?

[9] A. Yes.

Q. Is that your address at that time, 2595 2nd Street?

A. Yes.

Q. And does this indicate blood was taken?

A. Yes.

Q. And does this indicate that blood was taken and you were .269?

A. Yes.

Q. And blood was taken at what, 1705? That's what, five minutes after five?

A. Yes.

Q. Were you taken to the hospital at that time?

A. Yes, I was.

Q. And you say you think you had four to six drinks. What were you drinking, sir?

A. Beer.

Q. And were these regular twelve ounce beers or were they tap beers?

A. Twelve ounce beers.

Q. Now, is it your testimony that the car that struck your car was signalling for a right turn?

A. I believe so.

Q. What street was that turning into?

A. I believe it's 23rd.

Q. And why were you turning into 23rd Street?

[10] A. To go into Cumberland.

Q. And were you heading for home?

A. No.

Q. Where were you heading for?

A. We were heading for a bar.

Q. Another bar?

A. Yes.

Q. And who was with you in the car?

A. Carol Linbuhr.

MR. WILLIAMS: I have no further questions.

REDIRECT EXAMINATION BY MS. KINGSLEY:

Q. You were asked about the other times that you had a driving while intoxicated charge. Had you ever been involved in an automobile accident before on one of those occasions?

A. No.

Q. Ever injured anyone before when you've been drinking?

A. No.

Q. Did you intend to injury or hurt anyone on the date this occurred?

A. No.

Q. You were asked about the number of drinks you had at the bar. Did you have drinks before you got to the bar?

A. Yes, I did.

Q. Tell me about how many and what kind?

A. Probably around a twelve pack before I went to the bar.

[11] Q. And as a result when you were arrested for this did you plead guilty to this?

A. Yes, I did.

Q. Other than serving time and probation, was there any other part of your sentence?

A. No.

MS. KINGSLEY: That's all I have. Thank you.

THE COURT: Anything else, Mr. Williams?

MR. WILLIAMS: Just a couple questions.

RECROSS EXAMINATION BY MR. WILLIAMS:

Q. Mr. Hogner, you think you had a twelve pack of beer before you went to Dale's Twin Pines?

A. Yes.

Q. And at Dale's Twin Pines you had four to six, is that right?

A. Yes.

Q. So that would be at least 16 cans of beer and maybe 18 cans of beer, is that right?

A. Yes.

MR. WILLIAMS: I have no further questions.

MS. KINGSLEY: Just one more.

FURTHER REDIRECT EXAMINATION
BY MS. KINGSLEY:

Q. You talked about the number of beers. Can you tell me over what period of time that was? I mean, when during the [12] day you started and then how long until the accident?

A. It was probably within a five hour period.

MS. KINGSLEY: Okay. That's all I have. Thank you.

MR. WILLIAMS: No more cross.

THE COURT: You can step down. Any other witnesses?

MR. WILLIAMS: Call LeRoy Strenke in rebuttal.

LE ROY STRENKE, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WILLIAMS:

Q. Mr. Strenke, were you intending to turn at 23rd Street as your car approached that driven by Mr. Hogner?

A. No, I was not.

Q. Did you have any turn signal on?

A. No, I did not.

Q. Where were you bound for at the time of the collision?

A. I was on my way to my home.

Q. And is your home east or west of 23rd Street?

A. My home is west.

Q. Can you hear me? And is your home east or west of 23rd Street?

A. It would be west.

Q. And what is the path that you customarily follow to [13] your home?

A. Highway 48.

Q. And how many miles at 23rd Street would you deviate to get to your home?

A. Approximately nine miles.

Q. Do you know anybody who lives on 23rd Street?

A. No, I don't.

Q. Did you have any reason to be turning on 23rd Street?

A. No.

MR. WILLIAMS: No further questions.

THE COURT: Ms. Kingsley?

MS. KINGSLEY: No, Your Honor.

THE COURT: All right. You can step down.

MR. WILLIAMS: Rest.

THE COURT: Anything else?

MS. KINGSLEY: Rest.

THE COURT: Okay. Well, we'll figure out the jury instructions for this section so why don't we take them out for a little bit. This shouldn't be too long.

(Whereupon jury leaves courtroom).

THE COURT: The only three instructions I have apparently there is the middle burden of proof on this?

MS. KINGSLEY: Right.

THE COURT: So I'll read the burden of proof. The burden of proof on Question 1 rests upon the [14] party contending that the answer to the question should be yes, and, of course, that question would be, "Did Levi Hogner act maliciously toward LeRoy Strenke or in an

intentional disregard of the rights of LeRoy Strenke?" Yes or no. So the burden of proof is on the plaintiff.

MS. KINGSLEY: Your Honor, I should put in at this point under Wisconsin Law in order for this to go to the jury they have to prove a prima facia case and I'd like to make a motion for a directed verdict for this portion.

THE COURT: Go ahead.

MS. KINGSLEY: Well, under Wisconsin Law they have to show an intentional disregard for the rights of others. As Mr. Williams pointed out in his closing argument to the first portion of the trial, this was a careless mistake. This was a left turn accident. This isn't a case where you've got a drunk weaving down the road hitting cars. It's an accident which can occur at any time at an intersection. He thinks he sees a turn signal. Whether he does or not he thinks he's got time to make it through the intersection and he doesn't make it through. Certainly negligent and we stipulate to that. Certainly careless, but I don't think under Wisconsin case law that it rises to the level of being an intentional disregard for someone else's rights.

The case law, and perhaps Mr. Williams has other cases, [15] the case law that we looked at in this regard indicated that Wisconsin has not yet adopted a rule that says that if a person is drinking alcohol it definitely is a prima facia case, and absent aggravating circumstances or as the cases point out, absent outrageous conduct that then there's not sufficient evidence for it to go to the jury and we would argue in this case there's not sufficient evidence.

THE COURT: Mr. Williams?

MR. WILLIAMS: Judge, I have a number of cases which I can present to you. There's *Lievrow v. Roth* which is a Court of Appeals case, 157 Wis. 2d, 332, and I'm quoting from the head notes here. "Deliberately driving while alcohol impaired may warrant imposition of punitive damages in appropriate case where the outrageous conduct of driving while alcohol impaired has caused or contributed to the plaintiff's damages."

And the other head note, "Evidence of other incidents of drunk driving by a defendant was admissible in a civil action seeking compensatory and punitive damages arising out of an accident which occurred while defendant was allegedly intoxicated in order to show that he was aware of the danger of driving while intoxicated."

In the case, that's Court of Appeals, incidently, Judge, 1990. And the 1985 case, *Brown v. Maxey* in the Supreme Court, it says punitive damages may be awarded if the [16] plaintiff proves by clear, convincing evidence defendant's conduct was willful and wanton in disregard of rights of others.

And then we go to the 1990 case, Court of Appeals, *Twist v. Lale*, and quoting, "Conduct is outrageous if done in reckless disregard of another's rights reflecting a flagrant indifference to public safety". And quoting to the body of it, "Evidence of Lale's reckless driving provided an adequate basis for a finding that Lale recklessly disregarded Twist's rights and was flagrantly indifferent to public safety". And there are other unpublished opinions.

So what I wanted to call your attention to was the presumption under 885 of amount of intoxication. As Circuit Judge is aware, the 10th Judicial District sentencing guidelines puts this level of intoxication into the

highest category both for consumption of alcohol or amount of alcohol by test and the fact that there was an accident which was, in effect, caused by this and the fact then that it is a 5th offense and I'd ask you to take judicial notice of State versus Hogner, 98-CT-134 in which Hogner was convicted of a felony DWI on March 22, 1999, arising out of an incident which occurred on October 16th of 1998, this case.

So I think we've shown enough that this man's conduct was knowing, outrageous. He consumed, it appears, between 16 and 18 beers over a five hour period and the test, which is [17] undisputed, was .269. Certainly what I would consider to be a high test in my experience.

THE COURT: Anything else?

MS. KINGSLEY: No.

THE COURT: All right. I'm reading from 1707.01 which is the jury instruction for punitive damages, non-products liability for actions commenced on or after May 17, 1995, and it says punitive damages may be awarded in addition to compensatory damages if you find that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff, and it says that a person's actions are malicious when they are the result of hatred, ill will, a desire for revenge or inflicted under circumstances where insult or injury is intended. I don't think that portion fits this fact pattern as I understand the evidence.

I think I can say as a matter of law there's no evidence that indicates that Mr. Hogner's acts were a result of hatred, ill will, a desire for revenge or inflicted under circumstances where insult or injury is intended. But I

think the portion that will allow this case to go to the jury is there's a dispute from the second sentence of the second paragraph and that's where it says a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's [18] rights or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded.

I think the argument of the plaintiff is that Mr. Strenke as an operator of a motor vehicle on a public road in Wisconsin at the time and place that's material to this lawsuit is a class of people who are Wisconsin motorists and I think it's arguable that Mr. Hogner, who admitted from the witness chair that within a five hour period he consumed either 16 or 18 twelve ounce containers of beer, and that's one fact. The other fact that's important here is that he was convicted of operating while intoxicated-type offenses over a period of time. He has four convictions prior to this. I think that it can be argued that someone who's had four offense drunk drivings and yet goes out on the day in question and consumes 16 to 18 twelve ounce containers of beer is exhibiting, and I'm assuming that we can, that nobody was holding him down and pouring these down his throat involuntarily, and so I think that's an intentional act which arguably the jury may find that this was a disregard of the rights of the plaintiff and other motorists on the road and, of course, the plaintiff being a class of motorist on the road, and I think that those facts together indicate that Mr. Hogner was aware or should have been aware that his drinking these 16 to 18 twelve ounce containers of beer, [19] coupled with his knowledge of how the law in Wisconsin is on operating while intoxicated since he has four convictions before, that these acts arguably the jury could find that they're practically

certain to result in the plaintiffs rights being disregarded. So I'll deny your motion.

Now, let's go on and I've got the middle burden of proof. Then I have 350, presumptions, conflict as to the existence of basic facts. What is the basic fact that there's a conflict of evidence here? I don't think there's any. It's just what they do with that evidence. So I don't think that even applies.

Now, somebody else want to argue differently?

MS. KINGSLEY: That's fine, Your Honor.

MR. WILLIAMS: No.

THE COURT: Okay. So we won't give that. So the only two instructions that I can see we give them is that we read them the verdict, we read them the burden of proof and we read them the definition of punitive damages and send it all back to the jury.

MS. KINGSLEY: Will we be able to make a brief closing statement?

THE COURT: Sure. We'll do it just like we did before. Mr. Williams goes first and then Ms. Kingsley goes second. Okay?

MR. WILLIAMS: I'd like you to see an [20] instruction under 885, something about levels of intoxication, Judge.

THE COURT: Well, if you present it to me I'll consider it.

MR. WILLIAMS: I'll seek that. With your permission I will craft an instruction that parallels

885.235(cd) which indicates that the presumptive level of intoxication of .08 is presumptive that a person is under the influence of alcohol.

MS. KINGSLEY: And, Your Honor, I would strongly object. I'm guessing, I haven't seen the statute, but I would assume this is used in criminal matters and would not be appropriate in this action. I think the jury instructions cover the issue for civil matters and I think that would be very prejudicial to my client.

THE COURT: Here's what it says. 885.235 is entitled chemical test for intoxication and then it talks about in (1)(cd), it says in cases involving persons who have two or more prior convictions, suspensions or revocations as counted under 343.307, and it's stipulated that Mr. Hogner fits in that category, the fact that the analysis shows that the person has an alcohol concentration of .08 or more is prima facia evidence that he was under the influence of an intoxicant and is prima facia evidence that he or she has an alcohol concentration of .08 or more and that's what you want [21] me to read to them, correct?

MR. WILLIAMS: Yes.

MS. KINGSLEY: Your Honor, I don't think there's been any dispute that Mr. Hogner was intoxicated. He admitted what his blood alcohol content was. I think that again, that statute is written for criminal matters. He's already been convicted, served his jail time, his probation for it. I don't think it would be relevant here and I think it would be very prejudicial to my client.

MR. WILLIAMS: As you're aware, Judge, the standard for conviction such as Mr. Hogner's is .02 in cases for 5th offense and the purpose that I wanted to do that is

to be able to tell the jury with a foundation behind it that Mr. Hogner was three times in excess of the legal limit for DWI.

MS. KINGSLEY: Your Honor, if it would expedite things we would be happy to stipulate Mr. Hogner was legally intoxicated at the time.

THE COURT: Well, I'm going to allow it. I don't know exactly how it's going to be worded because I'm certainly not going to use terms like prima facia and things like that. I think what I'll do is just instruct them the parties have stipulated that at the time of the accident Mr. Hogner was legally intoxicated. The parties have also stipulated that before the accident, before the time of the [22] accident Mr. Hogner had been convicted of four prior operating while intoxicated offenses, therefore setting the standard, setting the blood alcohol standard for intoxication at .08 or more.

The parties have stipulated at the time of the accident Mr. Hogner was legally intoxicated. The parties have also stipulated that before the time of the accident Mr. Hogner had been convicted of four prior OWI offenses. Therefore the blood alcohol standard for intoxication is .08 or more. Okay. That's what I'm going to put in but you can make your objections on the record.

MS. KINGSLEY: Yah, I do want to make my objections on the record. Mr. Hogner was willing to stipulate that he was intoxicated at the time and I think that by bringing this element in it's confusing for the jury and they're going to be looking at this and the question to them. I think this confuses this with the criminal standards and he's already pleaded guilty and been convicted. He pleaded guilty and he served his time for that. I think

this is going to confuse them and I think we have all that we need in the punitive damage instruction. So I'd like to make my objection for the record.

THE COURT: Okay. Your objection is noted for the record and it's an argument that I understand and the only reason I think that it's fair game for Mr. Williams to [23] get this in based upon my previous ruling that I think the punitive damage instruction is appropriate in this case based upon his level of intoxication, amount of beer that he had in this five hour period and the fact that he knew or should have known since he was convicted of four offenses before that this is, I think, showing flagrant indifference to public safety, as Mr. Williams quoted from this one case, and because of that I think that provides a threshhold for Mr. Williams to, if he cares to, to argue that in this particular case Mr. Hogner was over three times the level of intoxication legally. Well, now, this is a misnomer. Sometimes we call it legal intoxication which in his case it's .08. So three times .08 would be .24. So I think that that's a fair argument that Mr. Williams has told us he wants to make to the jury and if he wants to do that I think he has a right for the Court to instruct the jury that he's correct. In this case .08 is the standard for the bar that Mr. Hogner, being convicted of two or more priors, should not have crossed and so I think it's okay. So that's what I'm going to do. But I understand your objection and perhaps the three wise guys down in Wausau will agree.

Okay. Can we bring them in?

(Whereupon jury returns to courtroom).

THE COURT: I am now going to instruct you on the law that's applicable to this phase of the trial [24] concerning punitive damages. First of all I want to tell you

that punitive damages have a different burden of proof than what you considered for these compensatory damages on the last verdict and this verdict that you're going to see just has two questions on it and it says, special verdict form as to punitive damages. It says, "We, the jury, hereby answer the special verdict question as follows: Question 1: Did Levi Hogner act maliciously toward LeRoy Strenke or in an intentional disregard of the rights of LeRoy Strenke?" And you're to answer that one either yes or no.

Then it says, "If you answered the preceding question 'yes', answer the following question:" In other words, if you answer Question 1 "no", you're done. If you answer it yes, then go on to Question 2. "What sum, if any, do you assess against Levi Hogner as punitive damages?" And then you've got your answer with a dollar sign in the blank line like you had for compensatory and that's it and it's to be dated today's date because I assume you won't come in after midnight. But if you do, put in the correct date and then the presiding juror or dissenting jurors.

Now, as to Question Number 1, this is where the burden of proof changes from the last verdict, which only was ordinary, so I'll read you this and I'll give this to you to take in. The burden of proof on Question 1 rests upon the party contending that the answer to the question should be [25] "yes", and, of course, that's the plaintiff. This burden is to convince you by evidence that is clear, satisfactory and convincing to a reasonable certainty that "yes" should be the answer to that question.

Clear, satisfactory and convincing evidence is evidence which, when weighed against evidence opposed to it, clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer

because of its greater weight and clear, convincing power. This burden of proof is known as the "middle burden".

The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence, which is what you had in the last verdict, but less than the higher burden which is beyond a reasonable doubt and that's the burden that's used in a criminal case.

If you have to guess what the answer should be after discussing all evidence which relates to a particular question, or if you conclude that the evidence is less than clear, satisfactory and convincing, then the party having the burden of proof as to that question has not met the required burden.

Now, this is the substantive instruction on punitive damages. It tells you what punitive damages are. Punitive damages may be awarded in addition to the compensatory damages that you've already found if you find that the [26] defendant acted maliciously toward the plaintiff, or in an intentional disregard of the rights of the plaintiff. A person's acts are malicious when they are the result of hatred, ill will, a desire for revenge or inflicted under circumstances where insult or injury is intended. A person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded.

The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future.

Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to punitive damages as matter of right.

Even if you find that the defendant acted maliciously or in an intentional disregard of the plaintiff's rights, you do not have to award punitive damages. Such damages may be awarded or withheld at your discretion.

You may not, however, award punitive damages unless you have awarded compensatory damages, which you already have.

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct.

[27] Factors you should consider in answering this question include one, the grievousness of the defendant's acts. Two, the degree of malicious involvement. Three, the potential damage which might have been done by such acts as well as the actual damage, and four, the defendant's ability to pay.

You may consider the defendant's wealth in determining what sum of punitive damages will be enough to punish the defendant and deter the defendant and others from the same conduct in the future.

Okay. That's it. So we'll start with the arguments on this issue. Mr. Williams?

MR. WILLIAMS: Thank you, Your Honor. This is the portion where I told you about we were going to do this in two phases. The Judge has explained this now. The question that you have to determine if a person who has

been convicted of drunk driving four times and now jumps into the felony level, a 5th offense drunk driving, is that –

THE COURT: Wait a minute. I forgot to give them one other instruction.

MR. WILLIAMS: That's on that percentage.

THE COURT: I forgot. Okay. This is my last instruction. The parties have stipulated that at the time of the accident Mr. Hogner was legally intoxicated. The parties have also stipulated that before the time of the accident Mr. Hogner had been convicted of four prior OWI [28] offenses. Therefore, the blood alcohol standard for intoxication is .08 or more. Okay. I'm sorry, Mr. Williams.

MR. WILLIAMS: You can see what happens towards the end of these trials where lawyers get tired and start letting slip on this stuff here.

But anyhow, here you've got the case. It's a philosophical question. Do you wish to condemn Levi Hogner's conduct in driving, having had four convictions where he goes and gets fired up and goes to three times the lawful limit of alcohol because we stipulated that the level of alcohol intoxication was .269.

Judge Henderson's last instruction to you indicates that the level, the line when you're over the line or not over the line is .08 in this.

Now, I do a lot of defense work and I can tell you my belief is that once you reach that 5th level when it changes from being a misdemeanor, stops being a misdemeanor, that people can make, and many people do make a mistake of multiple OWI's for one, two, three, four at which the law treats them fairly benignly with County Jail time

and such appropriate punishment where they are not branded with the defense of a felony conviction. Once you get to the 5th offense, you get to a felony and I suggest to you that I've got to condemn this or tell you because isn't it outrageous? Isn't it in reckless disregard when somebody gets in a car, [29] having been convicted four times, having consumed 16 to 18 beers in a five hour period and is driving down the road with other people on the road with the intent to go to another bar and get more?

Now, is that worthy of condemnation or not? Is it worthy of punitive, meaning punishment, damages to show that society says, this doesn't cut it? And I think that that's what the question you folks have to tell us. If you say no, then your duty is done. If your answer is yes, that that conduct steps beyond that of being a mistake and gets into the point of being outrageous to the point of deserving some punishment with it itself, then you have to answer the other questions and I've suggested the other answer to the question should be a sum of money sufficient to get the notice of Mr. Hogner and the notice of the public and the notice of the people that five offenses and causing somebody injury is too much. And it's not only when you cause an injury of the magnitude which you've assessed to Mr. Strenke, but it requires some kind of a message coming from the voice of the State, that is you folks as members of the public, saying we condemn this conduct and that conduct alone in itself is worth punitive damages and I suggest to you the figure of $25,000 is a reasonable sum under these circumstances to say, enough is enough. $25,000 worth of punishment. That may encourage Mr. Hogner, may encourage other people to not drive [30] again when you have consumed 16 to 18 beers or even a

lesser amount that would put you at .08 blood alcohol, three times the level in this case. That's the argument.

THE COURT: Ms. Kingsley?

MS. KINGSLEY: I'm going to equally be brief. Just to clarify, and the Judge already explained to you, it is a different standard of proof. It's clear and convincing evidence. Please keep that in mind when you come to your decision.

There's no question here that what Mr. Hogner did wasn't right. He's a very nice man. He did a very stupid thing. There's no question here. Mr. Hogner has been very up front through the entire trial about what happened.

But what you have to decide is did what he did rise to the level of intentional disregard of Mr. Strenke's rights? So I do ask you to keep the distinction.

It's one thing to say, geez, that was really stupid and that's true, but that's not the question before you. That would be an easy one to answer.

The question is, did he go out there and intentionally disregard somebody's rights? He testified he didn't intend to do it.

Yes, he had prior convictions. He was up front about those. But did he intend it? He had never hurt anybody before. He knew he had never been in an accident while [31] driving before.

Should he have made the jump and known when he went out he was going to injury somebody? Well, that's kind of a large leap. He's not making any excuses.

The other thing, when you talk about intentionally disregarding somebody's rights, I think there's two parts here. Should he drink and drive which, no, you shouldn't, but does that make your actions intentional if somebody gets hurt?

The other thing I wanted to bring up is in this case this isn't one of those cases where the drunk drives into the side of a house or somebody's weaving down the road and hitting people. This is a left turn at an intersection. It's the type of case, the type of accident that happens every single day whether or not somebody was intoxicated. So think about that when you're determining was this outrageous conduct.

Also you've heard that at least Mr. Hogner thought Mr. Strenke was going to turn. Whether or not that turn signal was on, Mr. Hogner believes it was and he thought that he could make the turn ahead of time. He certainly didn't intend to injure anybody.

I want to point you to a couple other things in the instructions. The reason I asked Mr. Hogner so much about what do you make and what are your expenses and everything is [32] because you do have the right to look at the defendant's ability to pay when you're looking at that part of the trial and I think it was pretty clear from Mr. Hogner's testimony. There's extremely limited ability to pay. He makes about $2,000 a month. He is covering his expenses but he is paying child support and those types of things. Really not much left over if you do the math on the numbers he gave you and that's why we brought it up.

The other thing that you're asked to look at and the Judge did read to you, the degree of malice involved. Well,

there's been no testimony that there was any malice here between the parties.

And the other thing he explained is this type of damage. You can award these damages if your purpose is to deter someone or punish someone. Mr. Hogner has already been punished for this. He's served time. He told you his sentence was a year. He talked about that. He pled guilty. He didn't try, you know, he didn't try to say, I didn't do it. He pled guilty. He served his time and I want to point out that this was in 1998 and so if one of the purposes is to deter conduct, you want to think, okay, what's it going to take to make this person not do this again? It's already happened. You heard the years of those convictions and when he pled guilty. That hasn't happened since. This accident did stop it cold back in 1998. He's taken responsibility. [33] He hasn't had this happen again. He has turned things around and he's come into court and said, I did it. It was stupid but I did it. That's basically the effect of what he's saying.

And the last thing I want to say is in Mr. Williams closing argument on the first part of his case he said, I think three times that I heard, it was a moment of carelessness and that's what this was. It was a stupid mistake. It was a moment of carelessness. That doesn't mean that it was a moment of intentionally going out and disregarding somebody else's rights.

Because he served his time, because he owned up to this, we believe he has been punished. He certainly shows that he has been deterred and we don't feel that in addition to what he's already gone through that an award of punitive damages would be justified. Thank you.

MR. WILLIAMS: Just a couple comments. Ms. Kingsley says he went and pled guilty. He didn't. He pled no contest, saying he didn't admit doing wrong. And under the argument Ms. Kingsley made they're saying that it has to be intentionally directed to LeRoy Strenke. He didn't know LeRoy Strenke. But under Ms. Kingsley's argument if you remember that famous case down in Kentucky where a fellow got drunk and went down the wrong way on the interstate and killed a bunch of kids in a school bus?, Well, he didn't [34] intend to do that and therefore no punitive damages.

The intentional act is getting in the car and driving a car in reckless disregard of the rights of the public. When I go home tonight to Amery, when you folks go home or when anybody goes home they have a right to expect that the cars that are opposing them that are on the highway are not driven by a person who's under the influence and in this case he's been punished. He was punished on the first offense. He was punished on second offense. He was punished on third offense. He was punished on fourth offense. She's saying he shouldn't be punished here. If that's the case, the more cases he gets of drunk driving and that, the more likely it is he shouldn't be punished because he's been punished five times, six times, seven times before. You know, that doesn't scour to the substance.

My suggestion to you is that this is an appropriate case for the award of punitive damages and you folks have the discretion to condemn this and say, this is wrong and we will punish. Tell the world that this is wrong by giving an award of punitive damages. That's all I have. Thank you.

THE COURT: Well, here's the verdict and the jury instructions.

(Whereupon jury leaves courtroom at 2:01 P.M.)

(Whereupon jury returns to courtroom at 2:33 P.M.)

THE COURT: The jury hereby answers the [35] special verdict questions as follows: "Question 1. Did Levi Hogner act maliciously towards LeRoy Strenke or in an intentional disregard for the rights of LeRoy Strenke? Answer 'Yes'."

"Question 2, what sum, if any, do you assess against Levi Hogner for punitive damages? Answer $225,000." There are no dissents. It's signed by the foreperson.

Is that your verdict?

JURY: Yes.

THE COURT: Ms. Kingsley, do you want to poll the jury?

MS. KINGSLEY: That's okay, Your Honor.

THE COURT: Okay. My final instruction to you is you do not have to answer questions about this case by anyone other than by me, and your service in this case is completed, and this includes the parties, lawyers, the media or anyone else. It is in the public interest that there be the utmost freedom of debate in the jury room and that jurors be permitted to express their views without fear of incurring the anger of any litigants or criticisms of any persons.

While nothing prohibits you from disclosing what happened in the jury room, you do not have to discuss the

case with anyone or answer any questions about it. You may confer with me before answering any questions asked by anyone.

[36] So there we have it.

(Whereupon jury leaves courtroom).

THE COURT: Anything else you want to do today?

MR. WILLIAMS: Nothing today, Judge, for the plaintiff.

THE COURT: Okay. Thank you.

(END OF RECORD)

[37] State of Wisconsin)

County of Barron)

I, Kevin Babbitt, hereby certify that I have compared the foregoing transcript with the shorthand notes taken by me at the hearing held in the above-entitled matter and find the same to be a true and complete transcript of said notes and containing all the proceedings had on said hearing.

/s/ Kevin Babbitt
Circuit Court Reporter

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No. 05-1026

IN THE

Supreme Court of the United States

LEVI HOGNER,

Petitioner,

v.

LEROY M. STRENKE and
JUANITA M. STRENKE,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE STATE OF WISCONSIN COURT OF APPEALS

RULE 15.8 SUPPLEMENTAL BRIEF OF LEVI HOGNER IN SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF WISCONSIN COURT OF APPEALS

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RULES

Supreme Court Rule 15.8 1

Levi Hogner filed a petition for a writ of certiorari on February 9, 2006, which has been submitted for conference before this Court on June 15, 2006. The petitioner presents this Supplemental Brief pursuant to Supreme Court Rule 15.8 to advise the Court of intervening matter not available at the time of his petition.

On May 30, 2006, this Court granted the Petition for a Writ of Certiorari to the Supreme Court of Oregon in *Philip Morris USA v. Williams*, No. 05-1256. In that case, the Court will consider two issues:

> 1) Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm;
>
> and
>
> 2) Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.

Philip Morris USA v. Williams, 127 P.3d 1165 (Or.), *cert. granted in part*, 74 U.S.L.W. 3665 (U.S. May 30, 2006) (No. 05-1256).

Hogner cited *Philip Morris USA v. Williams*, of course, at page 11 of his February 9, 2006 petition for a writ of certiorari. The *Williams* case, among many others, illustrated the trend, especially among state appellate courts, to ignore this Court's clear command in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

This Court's decision to accept *Williams* for review should not dissuade it from granting Levi Hogner's pending petition. This case presents a constitutional issue distinct from those in *Williams*. Indeed, it would provide a compelling companion to *Williams*. The issue presented by the petition in *Hogner* is:

> Can the state judiciary ignore the constitutional due process requirements for punitive damages, dismissing as "dicta" the standards in *State Farm Mut. Auto Ins. Co. v. Campbell*, to award more than 110 times the $2,000 actual damages in a personal injury/drunk driving case?

While this Court's treatment of *Williams* may well guide the Wisconsin Court of Appeals in any remand, this case requires separate consideration. The facts are distinct from those in *Williams* in one very constitutionally-significant respect. In *Williams*, the plaintiffs' actual damages were substantial. In *Hogner*, they were *de minimus*.

Even if this Court were to remand *Hogner* for application of its decision in *Williams*, the *Hogner* plaintiffs will argue that the *Williams* holding does not apply. The plaintiff in *Williams* suffered substantial actual damages—a death from smoking-related illness. The plaintiffs in *Hogner* suffered only soft tissue injuries with minimal compensatory damages.

To avoid a constitutional violation, the plaintiffs will—as they have in their opposition to the petition—try to manipulate the Court's statement in *State Farm* that "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'"

State Farm, 538 U.S. at 425, *citing BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996). Without a decision by this Court separate from *Williams*, the Wisconsin court, on remand, may well ignore once again this Court's binding constitutional directive that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425.

A decision in *Williams* will not instruct lower courts on the constitutional parameters of punitive awards when a "particularly egregious act has resulted in only a small amount of economic damages." *Id.*, at 425. The threat to due process comes not just in cases alleging mass torts, pervasive or societal harm, and massive injury. Cases like *Williams* are the exception. Cases like *Hogner* are far more common in this country's judicial system and, notwithstanding the respect owed any jury's verdict, a minor injury should not provide a platform for punishment that exceeds the bounds of both the Fourteenth Amendment and common sense. This Court should grant Hogner's Petition for a Writ of Certiorari to address that point of distinction with *Williams*.

For the reasons stated in his Petition for a Writ of Certiorari, the Court should grant Levi Hogner the writ necessary to review and reverse the Wisconsin Court of Appeals. In the alternative, Hogner requests that the Court defer consideration of Hogner's petition until the Court reaches a decision in *Philip Morris USA v. Williams*, No. 05-1256.

Dated: June 7, 2006.

Respectfully submitted,

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